No. 86-949

In The

Supreme Court of the United States

October Term, 1986

ARGUS INCORPORATED and INTERPHOTO CORPORATION,

Petitioners,

vs.

EASTMAN KODAK COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in determining that as a matter of law petitioners were not injured by respondent's antitrust violation because the Court concluded that petitioners had not proven that the full magnitude of damages which they claimed was caused by the violation.

2. Whether the Court of Appeals erred in interpreting this Court's *Matsushita* decision to authorize it to weigh the evidence and place a heavy burden of persuasion on petitioners as opponents of the motion for summary judgment.

3. Whether the Court of Appeals erred in requiring petitioners to establish that respondent's violation was the exclusive cause of petitioners' injury, in order to avoid entry of summary judgment dismissing the complaint.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully request that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, entered on September 8, 1986, which affirmed a decision of the United States District Court for the Southern District of New York granting summary judgment dismissing petitioners' antitrust action.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 801 F.2d 38 (1a-19a). The opinion of the District Court is reported at 612 F. Supp. 904 (20a-72a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1986. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The portions of the Constitution, statutes, and Rules of Civil Procedure relevant to this petition are set forth at pages 73a - 76a of the Appendix.

STATEMENT OF THE CASE

A. Background Facts

Petitioners Argus Incorporated ("Argus") and Interphoto Corporation ("Interphoto") competed with respondent, Eastman Kodak Company ("Kodak"), in the sale of cameras and other photographic products (S99-100; E96-103, 244, 1344).[1] Argus manufactured and sold still and movie cameras, slide and movie projectors, and other photographic equipment bearing Argus trademarks (E244-249, 2655-2661) and Interphoto sold

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1. References herein are as follows: "a" refers to the Appendix to this Petition; "E"; "S"; and "P" refer to the following portions of the Joint Appendix—"E": Exhibits; "S": Summary Judgment Materials; and "P": Pleadings and Other Materials.

photographic products bearing its own trademarks and trademarks of other vendors (E96-103, 2820-2863; S100-103).

In 1970, when Argus acquired majority control of Interphoto,[2] Interphoto began to distribute Argus products. On March 1, 1975, Argus made Interphoto its sole distributor and the exclusive licensee of its trademarks (E1040).

In March 1972, Kodak introduced the 110 camera (the "pocket camera"). Argus was the first company to develop and market a 110 camera after Kodak (E124, S1356-18, 1356-19, 1357). Until 1975, most 110 cameras, including the Kodak 110 the Argus' 110[3] and 110 cameras of other vendors, used a device known as the "magicube" for illumination. The magicube, however, produced red dots in a subject's eyes, an undesirable effect known as "red-eye" (E552-554, 571-573, 771, 780; S1497-1500, 909-910, 862-864).

B. Respondent's Violation of the Antitrust Laws

Prior to April 10, 1975, Kodak conspired with General Electric Company ("GE") to prevent Kodak's competitors from acquiring vital information about a "flipflash" illumination device developed by GE (E1682-1696).[4] Kodak was therefore the only firm able to

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2. Neither Argus nor Interphoto has another parent company, a subsidiary which is not wholly owned, or a publicly traded affiliate.

3. Argus' 110 camera was found by Kodak to be superior in significant respects to the Kodak 110 (E2008-2013).

4. The illegality of the flipflash conspiracy was established in *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) and was given collateral estoppel effect in this case, *Argus, Inc. v. Eastman Kodak Co.*, 552 F. Supp. 589 (S.D.N.Y. 1982), and in an action brought by GAF. *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203 (S.D.N.Y. 1981).

offer 110 flipflash cameras to retailers when GE introduced the flipflash device on April 10, 1975 (S829-830, 867-869, 885-887, 1444-1448).[5] Flipflash had a significant advantage over magicube; it virtually eliminated the "red-eye" phenomenon (E554, 557, 558, S1515-1522, 1472-1480, 427-430, 362-367).

C. Petitioners' Injury

Kodak's introduction of a 110 flipflash camera on April 10, 1975 made Argus' 110 magicube camera obsolete (E2941; S1054-1055, 1185, 1380-1385). Although Interphoto was one of the first wholesalers able to offer a 110 flipflash camera in competition with Kodak, Interphoto missed the Christmas season in accordance with Kodak's expectation (S1070-1077, 1173, 1447-1448).

In opposition to respondent's motion for summary judgment, petitioners submitted evidence indicating that as a result of respondent's violation petitioners were suddenly unable to meet the sales levels they had previously projected to forecast their needs for facilities, personnel and financing in 1975 (E1001, 1003, 2066), and that petitioners (i) experienced a decline in the sale of 110 cameras (E1001, 1003, 955-956, 2049; S1100-32, 1100-33, 1101, 1135-1136, 1208-1209); (ii) could only sell those cameras at substantially reduced prices (E844-845, 2049; S1080-1081, 1093-1094, 1558, 1570); (iii) experienced a loss in the sale of other products because of their inability to offer a marketable 110 camera (E1003, 2066; S69, 909-914 and 1563-1565, 1035-1038, 1054-1056,

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5. Kodak was the only firm able to offer retailers commercial quantities of 110 flipflash cameras during the vital months of June through October, the period in which retailers purchase photographic products for Christmas sales to consumers (S396, 397, 1376, 1377). In making sales forecasts for 1975 Kodak correctly assumed that no competitor would be able to market a 110 flipflash camera during that year (S1444-1448, 1490-1491).

1085-1089, 1100-27, 1137); and (iv) were ultimately forced to abandon their wholesale photographic business (E56, 911, 1534, 2994-2995, 3673; S69, 409-415, 471-475, 967-977, 1042-1046, 1088-1089, 1100-25, 1142-1144, 1265-1266, 1269-1270, 1284-1287, 1299-1301, 1525).[6]

D. Procedural History

In January 1985 Judge Gagliardi reserved decision on Kodak's motion for summary judgment. Judge Gagliardi directed that at trial "Kodak should be prepared to address all of plaintiffs' damage theories." The case was then referred to Judge Pollack for trial (S682-684). Judge Pollack elected to hold a hearing pursuant to Rule 43(e) of the Federal Rules of Civil Procedure on Kodak's motion for summary judgment. He limited the hearing to two issues: (1) petitioners' standing to sue; and (2) causation—"an evidentiary indication that there was a nexus and a causal link from the violation." Judge Pollack stated that consideration of "the matter of the scope of the damages" would be deferred (S690, 694-695).

The Rule 43(e) hearing directed by Judge Pollack was concluded after thirteen days of oral testimony and one day of a videotaped deposition. The evidence submitted to the Court

6. Interphoto planned to use the Argus 110 magicube camera as its "lead line" product commencing March 1, 1975 (S416-426, 1035-1038, 1257-1259, 1324-1325; E2941, 949, 955-956); as noted above, that product was obsoleted by flipflash. It was common in the photographic industry for Interphoto and its competitors such as Kodak and Vivitar to use a product such as a camera as a "lead line" product to help sell other products such as straps, lenses, photo albums, chemicals and screens (*Interphoto*: S354-361, 409-415, 416-426, 454-459, 1037-1038, 1109-1112; *Vivitar*: S1372-1373; *Kodak*: S919, 1462-1467; E563, 622, 838). In 1969, Interphoto obtained a preliminary injunction restraining Minolta from terminating its sales of products to Interphoto on the ground that Interphoto would suffer losses of sales of other products if it could not sell Minolta products. *Interphoto Corporation v. Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y. 1969), *aff'd*, 417 F.2d 621 (2d Cir. 1970).

had been directed to the issues specified by Judge Pollack; petitioners did not call their designated expert economist (S174) as a witness concerning "the matter of the scope of the damages," the issue that had been deferred by the District Court. Kodak called no witnesses.

Judge Pollack granted respondent's motion for summary judgment on the grounds that (1) petitioners lacked standing to sue and (2) respondent's violation was not the proximate cause of injury to petitioners. The Court of Appeals declined to address the standing issue but affirmed the District Court's grant of summary judgment on the ground that petitioners had not been injured because respondent's violation had not caused the demise of petitioners' business. Petitioners seek a writ of certiorari reviewing the judgment of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

Introduction

This Court has on three recent occasions granted certiorari to clarify the standards to be applied in passing on motions for summary judgment. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986) ("*Matsushita*"); *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986); *Celotex Corporation v. Catrett*, 106 S. Ct. 2548 (1986).[7] The intense attention the Court has given to summary judgment practice reflects a keen awareness both of the opportunities and of the dangers associated with a use of summary judgment to lessen the burden placed on the lower courts by the large and varied range of disputes submitted to them for resolution.

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7. In a fourth case, *Ford Motor Company v. Tunis Brothers Company, Inc.*, 106 S.Ct. 1509 (1986), this Court granted certiorari, vacated the judgment, and remanded the case to the Third Circuit for further consideration in light of *Matsushita*.

Particular attention has been paid by the Court to the proper definition of the standards to be applied in passing on motions for summary judgment in complex cases. For it is recognized that in these standards a balance must be achieved between the use of summary judgment as a means of expeditious disposition and preservation of the constitutionally conferred right to trial by jury. The gravamen of petitioners' position is that the Court of Appeals misinterpreted this Court's recent summary judgment decisions, radically altered the balance that had been carefully struck by this Court between the need for expeditious disposition and the need to preserve the right to trial by jury, and adopted a position so detrimental to the party opposing a motion for summary judgment as to constitute a denial of the constitutionally conferred right to trial by jury.[8]

This case, moreover, presents both a necessity and an extremely important opportunity for this Court to reaffirm and to vindicate the fundamental role of trial by jury. It is urgent that the Court do this because in the present case and in many other cases decided by the lower courts, there is a growing trend to replace trial by jury by summary disposition in an ill-conceived and unsuccessful attempt to economize on the use of litigation resources. In the words of Judge Posner of the Seventh Circuit many courts have begun looking for "cheap and fast substitutes for the conventional Anglo-American trial."[9]

Judge Easterbrook, a colleague of Judge Posner in the Seventh Circuit, has expressed his strong disapproval of the

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8. The narrow scope of summary disposition permitted by Rule 56 is mandated by the Seventh Amendment to the United States Constitution. *Fidelity and Deposit Company of Maryland v. United States*, 187 U.S. 315 (1902); *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620 (1944).

9. *Morrison v. Murray Biscuit Company*, 797 F.2d 1430, 1433 (7th Cir. 1986).

"substitute" for the "conventional . . . trial" employed in the present case because it is neither "fast" nor "cheap" nor consonant with the appropriate and requisite division of responsibility between judge and jury. In commenting on a case like the instant one in which a judge who was not willing to dispose of a motion for summary judgment on the proof submitted to him in writing, proceeded to order an oral hearing pursuant to Rule 43(e) of the Federal Rules of Civil Procedure and then considered and weighed the evidence presented at the hearing and granted the motion, Judge Easterbrook stated:

> "The district judge stated that under Rule 43(e) the court may 'receive *and weigh*' oral and written evidence . . . . If this were right, it would be the end of the difference between summary judgment and trial; indeed it would be the end of the jury trial. All a judge would have to do is identify a dispositive issue, set a hearing under Rule 43(e), and resolve all factual disputes . . . .
>
> A judge hearing a motion for summary judgment has no . . . right to decide *which* evidentiary materials are the best ones for resolving a disputed question of fact; the judge may not resolve the dispute at all . . . .
>
> [O]ral testimony also could waste a lot of everyone's time . . . . Because the judge may not resolve evidentiary disputes, he will do the same thing after hearing the testimony he should have done after reading the affidavits; if the judge denies the motion the same witnesses will need to reappear for the trial, and if he grants the motion the witnesses did not need to appear at all. Either way the witnesses appear too many times. The litigants,

> their counsel, the witnesses, and the judge all will be the worse for the experience. One trial per case is enough. Rule 43(e) hearings on motions for summary judgment therefore should be rare."[10] (Emphasis in original.)

The process through which the right to jury trial may be eroded in the interest of supposed judicial economy is of vital importance to a litigant's rights. Moreover, the development of this process may often change the standards applied in passing on motions for summary judgment in a manner favorable to the proponent of the motion by means which are not acknowledged in a court's opinion. Judicial supervision by this Court to ensure that correct standards are applied will be extremely difficult.

The court below did not pursue a course of unacknowledged deviation from the accepted view of how a motion for summary judgment should be determined, but rather expressly adopted new standards which make it materially easier for a party seeking summary judgment to prevail. This Court is thus presented with a rare opportunity to provide vitally needed guidance as to the considerations which should control a use of summary judgment as a means of responding to the erroneous supposition that the litigation burden of the lower courts can be properly or effectively lessened by that means.

Although the Court of Appeals did not state that a need to economize on litigation resources was its basis for adopting a position facilitating a grant of summary judgment, its action is part of a trend to increased use of summary judgment[11] which has

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10. *Stewart v. RCA Corporation*, 790 F. 2d 624, 628-629 (7th Cir. 1986).

11. Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples* (Cont'd)

been expressly approved by the Second Circuit's Committee on the Pretrial Phase of Civil Litigation.[12]

(Cont'd)
of Equalibrating Tendencies in the Antitrust System, 74 Georgetown Law Journal 1065, 1104 (1986); *The Supreme Court, 1985 Term—Leading Cases—Summary Judgment: Burdens and Standards of Proof*, 300 Harvard Law Review 250, 258 (November 1986); Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1954).

12. The Committee, consisting of judges, practitioners and academics appointed by the Chief Judge of the Circuit, began its discussion of summary judgment practice by characterizing summary judgment as a "cost-effective" device (*Final Report of the Second Circuit Committee on the Pretrial Phase of Civil Litigation*, June, 1986, at p. 16). It makes a number of recommendations designed to make "accelerated dispositions more readily available in appropriate cases," *ibid*, p.3. *See Knight v. U.S. Fire Insurance Co.*, No. 86-7294, at p. 187 (October 22, 1986), citing the Report.

An article commenting on the opinion of the court below links the result it reached with the recommendations of the Committee:

> "Actions, of course, speak louder than words. Last month, the Second Circuit backed up the Committee's pronouncement [encouraging the use of summary judgment] when it affirmed the grant of summary judgment in a complex antitrust action.
>
> To reach its conclusion in *Argus*, the Second Circuit extended the reasoning of *Matsushita* far beyond the facts presented in that case. In *Matsushita*, the Supreme Court held that heightened scrutiny of the summary judgment record is appropriate in cases that do not, as a legal matter, make 'economic sense.' In *Argus*, the Second Circuit essentially made the same evidentiary requirement because the *facts* did not seem to support the factual allegations of the Complaint. But in doing so, the Second Circuit quite clearly weighed the evidence—it discounted certain documentary and testimonial evidence—in determining that the claim was implausible as a factual matter." Stoll and Goldfein, *Antitrust and Trade*

(Cont'd)

It is respectfully submitted, however, that it is constitutionally impermissible as well as impractical, uneconomic and unwise to respond to a perception of excess litigation (under the antitrust laws in particular[13]) by departing from the constitutional separation of summary judgment and trial in our procedural system.

What the advocates of "cheap and fast substitutes for the conventional Anglo-American trial" must be urging is in effect a cost benefit analysis with respect to summary disposition in which different values are assigned to the relevant costs and benefits than has previously been the case. To appreciate what is entailed in such a proposal it is necessary first to specify the cost benefit calculation underlying the previous view of summary judgment that has long prevailed and which its critics urge should be altered in the name of judicial economy.

The standard that there is no "genuine issue" as to a

(Cont'd)

Practice—Judgment in a Flash, New York Law Journal, Volume 196, No. 78, October 21, 1986, pp. 1, 2.

On December 1, 1986, the National Law Journal characterized the decision of the court below, the decision in *Knight* and the Committee Report, as representing "a 180-degree shift from the 2d Circuit's prior view of summary judgment," and noted that other recent cases applying the "'new' Rule 56" were "merely illustrative of the tremendous impact of the Supreme Court's trilogy of Rule 56 decisions." Stewart, *Civil Procedure—Rulings Make Summary Judgment Possible in Complex Litigation*, National Law Journal, Vol. 9—No. 12, at p. 22 (December 1, 1986). *See also, The Brokers Assistant, Inc. v. Williams Real Estate Co., Inc.*, 84 Civ. 1356 (S.D.N.Y. 1986).

13. A recent empirical study casts doubt on the view that private antitrust litigation is a primary cause of an excessive amount of litigation in the federal courts: "the 'antitrust explosion' of the 1970's has now subsided . . . [there is] a reduction in the overall number of cases." Salop and White, *Treble Damages Reform: Implications of the Georgetown Project*, 55 Antitrust Law Journal 73, 79 (1986).

"material fact" means in cost benefit terms that the motion will not be granted if there is *any* chance that at trial a determination favorable to the litigant opposing the motion will be made. Thus as a matter of the explicit text of Rule 56, reflecting the constitutional right to trial by jury, that constitutional right is too important to our society and, consequently, the cost of a litigant being deprived of *any* chance to prevail at trial is too great to warrant the saving in judicial resources which supposedly may be achieved by granting summary judgment.

What the advocates of increased use of summary judgment are saying is that we should grant summary judgment even though there is *some* chance that a party would prevail at trial. Under this view it is appropriate to do this because looking at such cases as a group, the savings in litigation resources with respect to that proportion of them in which the party will *not* prevail at trial justifies the social cost of denying the favorable outcome to that proportion of them who *could* prevail at trial.

In mathematical terms the argument is that if a particular case is representative of a class of disputes in which it is believed that the litigant opposing summary judgment has a one in ten chance to prevail at trial, it may be cost effective always to grant summary judgment so that ten costly trials will be replaced by ten less costly successful motions for summary judgment at a cost of only one act of injustice.

It is respectfully submitted that, quite aside from the fact that such a cost benefit approach is precluded by the Constitution and the text of Rule 56, it is doubtful that any saving in litigation resources can be achieved by adopting standards for the disposition of motions for summary judgment more favorable to the proponent of the motion. This is so because of the expected responses of litigants and their counsel to a new regime in which summary judgment is more frequently granted. It must be expected

that if summary judgment can be more easily obtained more summary judgment motions will be made. It is true, of course, that some of these motions may substitute for trial. Others, however, in which the motion is denied, will represent additional proceedings in cases which must be tried anyway. Moreover, counsel for both sides will make more extensive factual presentations in support and in opposition to a motion for summary judgment. And each motion would not only be determined by weighing a more extensive record; that record will then be transported to the Courts of Appeal in more cases. All of this will increase rather than reduce from the overall litigation burden.[14] In light of these responses to the proposed change in practice, it is doubtful what saving, if any, in litigation resources can be achieved.

The errors made by the Court of Appeals involve changes in the standards controlling the disposition of a motion for summary judgment favoring the proponent of the motion. They permit the court to weigh the evidence submitted by the proponent and the opponent, and decrease the role of the jury as the trier of fact. The alteration in standards by the court below will, therefore, have profound implications in future cases. The case thus represents an important instance in the decisional trend discussed above.

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14. The proposed change would also increase uncertainty as to the governing standard, particularly during the period of transition to the new regime, and if the change is effected by a range of unacknowledged and varied responses by the District Court judges and the Courts of Appeals, uncertainty will be a permanent feature of the system. Uncertainty of this kind will inhibit settlement by increasing disagreement among litigants as to a likely outcome of motions for summary judgment, inspire shopping in search of a forum taking what from the particular litigant's perspective is a more desirable approach to summary judgment, and will generate more appeals from determinations of the motion.

I.

THE COURT OF APPEALS ERRED IN DETERMINING THAT PETITIONERS WERE NOT INJURED BY RESPONDENT'S VIOLATION, BECAUSE THE COURT CONCLUDED THAT PETITIONERS HAD NOT PROVEN THE FULL MAGNITUDE OF DAMAGES WHICH THEY CLAIMED WAS CAUSED BY THE VIOLATION.

Petitioners claimed damage for lost camera sales and damage for lost sales of other products because of petitioners' impaired ability to compete in the sale of cameras. Petitioners further contended that their entire business in photographic products was fatally damaged by the consequences flowing from respondent's violation. Both the District Court and the Court of Appeals considered it as obvious that petitioners were harmed.[15] The Court of Appeals nevertheless took the view that since petitioners had claimed that their entire photographic business had been destroyed by forces set in motion by respondent's violation, respondent's motion for summary judgment must be granted if the full consequence petitioners ascribed to respondent's conduct was not caused by it.[16]

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15. District Judge Pollack stated: "During 1975, no one other than Kodak had substantial quantities of flipflash cameras. *Consequently, camera dealers sold conventional cameras at a lower price.*" (23a) (Emphasis supplied.) The District Court also stated: "The secrecy agreement restricted the disclosure of the flipflash project to camera manufacturers thereby delaying the manufacturers from designing, tooling up, and advertising for a new product," (32a-33a) clearly indicating that substantial injury resulted from respondent's anticompetitive conduct. The Court of Appeals similarly stated: "Because the flipflash could not be used with cameras designed for the flashcube or magicube and because the confidentiality agreement [between respondent and GE] ensured that Kodak's competitors would not begin to develop compatible cameras before the Kodak announcement, *Kodak had no significant competition in flipflash cameras for several months after the announcement*" (4a). (Emphasis supplied)

16. The court below used the term "abandonment" with respect to damages

(Cont'd)

The opinion below makes it clear that this approach has been adopted by stating that:

> "We have reviewed the record and have concluded that there is no genuine issue of fact with regard to whether the flipflash confidentiality agreement caused *Interphoto's and Argus' commercial demise*" (10a). (Emphasis supplied.)

The manner in which the court below framed the injury question, if utilized in subsequent cases, can have a dramatic impact on the vindication of rights conferred on private plaintiffs by the antitrust laws. A plaintiff will be obliged to quantify each interrelated element of its damage claim in order to avoid an entry of summary judgment if it is unable to sustain the entire claim advanced. More subtly, all of the complex and varied connections between the anticompetitive conduct of a defendant and the harm suffered by a plaintiff will not be assessed by a jury, free to utilize its combined common sense to resolve issues of causality, with the benefit of a fully developed record, but will be determined instead by a judge at a preliminary hearing. And if a judge concludes that the causal nexus between defendant's

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(Cont'd)
short of what the court characterized as petitioners' "commercial demise." By "abandonment" the court apparently meant that petitioners' failure to specify dollar amounts for these various aspects of its damage claim precluded them from urging that they were injured in these respects. As noted above, however, the District Court had expressly deferred consideration of "the matter of the scope of the damages" and limited the factual issue to be determined upon the hearing of respondent's summary judgment motion to causation—"an evidentiary indication that there was a nexus and a causal link from the violation." (S690, 694-695.) In addition, petitioners expressly claimed that "the fact that they did not have flipflash cameras for sale during the 1975 Christmas season put them at a terrible competitive disadvantage not only with respect to the sale of 110 cameras, but also with respect to the sale of all their other products . . ." (S43).

anticompetitive acts and the full magnitude of harm formulated by plaintiff's counsel is inadequately demonstrated, the plaintiff's entire action will be dismissed.

That this standard of actionable injury is erroneous is made evident by this Court's opinion in *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 114, n.9 (1969):

> "Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage." (Emphasis in original.)

II.

THE COURT OF APPEALS ERRED IN INTERPRETING THIS COURT'S *MATSUSHITA* DECISION TO AUTHORIZE IT TO WEIGH THE EVIDENCE AND PLACE A HEAVY BURDEN OF PERSUASION ON PETITIONERS AS OPPONENTS OF THE MOTION FOR SUMMARY JUDGMENT.

The *Matsushita* case, on first impression, represents an extraordinary use of summary judgment. This Court reversed the Court of Appeals and invoked summary judgment to bring to an end an antitrust case in which many factual issues had been perceived and a voluminous factual record had already been compiled. It is extremely important for the proper administration of the system of private antitrust enforcement that the lower courts correctly interpret the meaning of this seemingly radical innovation in summary judgment practice.

The touchstone concept in *Matsushita* is the notion of

"implausibility." This Court held, as the Court of Appeals correctly noted, that if a plaintiff's claim is "implausible . . . more persuasive evidence then would otherwise be necessary" must be presented to avoid a grant of summary judgment for defendant, 106 S.Ct. 1356. This Court, however, used the concept of "implausibility" in a carefully circumscribed sense: "the claim is one that simply makes no economic sense." *Id.*

It is clear why this Court so narrowly defined this term. The conclusion that a claim is "implausible" rests on a judgment with respect to the persuasiveness of evidence which should be appropriately made by the trier of fact, not by a judge passing on a motion for summary judgment. Thus a rule authorizing the court to determine "implausibility", if not carefully confined, would authorize courts to weigh the evidence and thus impair the right to trial by jury. Indeed, this is particularly so with respect to ultimate facts, such as reasonableness or causation, precisely because the determination involves an assessment of many evidentiary facts.[17]

Matsushita, moreover, did involve such an ultimate issue—whether defendants had acted in concert or individually. The Court nevertheless disposed of the issue on summary judgment. In doing this, it therefore created a careful exception to the rule forbidding a court to determine a factual issue: If economic theory and common sense dictate that certain expectations as to behavior are so firmly grounded that it is "implausible" that they will not be realized, someone asserting that the actual events were different from the expected ones must satisfy an unusually heavy burden of persuasion. Thus, in the context of a conspiracy issue, if strong

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17. Schwarzer, n. 11, *supra*, at pp. 471-472; 1 Pt. 2 Moore's Federal Practice, § 21.34, at p. 36, *Manual for Complex Litigation, Second* (1985); *Hayden Publishing Co. v. Cox Broadcasting Corp.*, 730 F.2d 64, 69-70 (2d Cir. 1984).

independent grounds account for conduct which is claimed to have been adopted pursuant to a conspiracy, or if supposed purposes of the conspiracy cannot in fact be accomplished, the court, on summary judgment, may conclude that no conspiracy exists absent some strong showing to the contrary by the plaintiff.

The crucial error made by the Court of Appeals was in failing to appreciate the meaning of the term "implausibile" as carefully defined by this Court. This misinterpretation had two consequences.

First, the Court did not see that petitioners' claims were *extremely plausible* within the meaning of the concept as carefully defined and utilized in *Matsushita*. It was thus erroneous as a matter of law to place on petitioners the burden to produce "more persuasive evidence than otherwise would be necessary." In simple terms what could be more "plausible", that is, make more "economic sense", than that competitors would be worse off not knowing that the dominant firm in the photographic market will introduce an important new camera? Is it not, indeed, also "plausible" that Interphoto, as a distributor of a wide range of photographic products, would be damaged in selling products other than the camera obsoleted by Kodak's introduction of flipflash? Surely common sense dictates that retailers are less inclined to look to a distributor as a source of supply after an important product offered by the distributor is rendered obsolete.[18]

Thus, the correct teaching of *Matsushita* as applied to this case is that since petitioners' claim *is* plausible, a court should be *less* inclined "than otherwise would be the case" to grant summary judgment because of any doubt which may exist as to

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18. Evidence established that using a "lead line" product to help make sales of other products was an accepted marketing practice by distributors in the photographic industry. *See* n. 6 *supra*.

the precise damages suffered. This lower court misreads *Matsushita* as increasing petitioners' burden, when in fact it means that it should be lessened.

The Court of Appeals not only failed to afford petitioners the favorable treatment to which they were entitled because their claims did make "economic sense", but also interpreted *Matsushita* to authorize the Court to weigh the evidence and place a heavy burden of persuasion on petitioners.

The court, in support of this approach, quotes language in *Matsushita* that "More persuasive evidence" will be required when the "factual context renders [a] claim implausible," 106 S. Ct. 1356. It, however, misconstrues this language. As discussed above, what this Court meant by an "implausible" claim was contending that people behaved contrary to our strongly grounded expectations as to how they would have behaved in the circumstances of the particular case. It is in the sense of the circumstances in which the defendant's claimed conduct occurred that this Court used the phrase "factual context." It did not mean that a court could select evidence offered by a proponent of a motion for summary judgment which the court considered persuasive, label this body of evidence "the factual context", and place the burden of persuasion on the party opposing the motion to refute the favored evidence. Nor could the teachings of the *Matsushita* case be so construed without, in effect, providing a disguised rationale for a court weighing evidence and granting summary judgment to the side whose evidence is regarded as more persuasive.

As this Court has recently re-emphasized:

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a

> judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor . . ." *Anderson v. Liberty Lobby, Inc., supra*, at p. 2513.

That these established principles were violated in the present case is made evident by the structure of the court's opinion. The court first constructs a "factual context" it considers persuasive and then turns to contrary evidence offered by petitioners, after formulating in the following terms the posture in which that evidence will be evaluated:

> "Against this background of contemporaneous evidence inconsistent with present claims[19] . . . we

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19. The court also referred to "varying damage theories in this litigation." What was apparently meant by this reference was the failure to claim specifically in the early stages of the litigation that the Argus 110 camera was a "lead product" so that respondent's violation in obsoleting the camera impaired petitioners' ability to sell their other products. In the original complaint, however, petitioners did allege that they were severely damaged by the flipflash conspiracy (P40-43, 46-48). Petitioners also claimed that by reason of the violation involved here and other anticompetitive conduct of respondent they:

> " (a) suffered huge capital and operating losses;
>
> (b) [have] been deprived of sales and profits which they would have otherwise realized;
>
> (c) [have] been precluded from corporate and business growth which they would have otherwise achieved;
>
> (d) lost customers and potential customers;
>
> . . .
>
> (g) [have] suffered damage to their value as a going concern" (P51,52).

> turn to a more detailed examination of plaintiffs' present claim" (12a).

It is, of course, not possible in a petition for certiorari to consider in detail all of the respects in which the court below preempted the function of the jury and resolved factual issues in constructing a "factual context" and then turned to petitioners' evidence to determine if it was sufficient to satisfy the burden of persuasion it placed on petitioners. Two techniques employed extensively by the court, however, may be cited to illustrate the approach taken.

First, the court misinterpreted documents prepared by officers and employees of petitioners as expressing the unequivocal, unambiguous and considered judgment of petitioners' management that factors other than respondent's violation had caused *all* the financial harm suffered by petitioners (11a-12a). In fact, however, contemporaneous documents did attribute harm to respondent's violation.[20] Moreover, *none* of these documents, placed in the context in which they were prepared and were to be used may be

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20. Contemporaneous documents attributed the impairment of petitioners' competitive position to respondent's violation. In a letter to shareholders dated May 28, 1975 the president of Interphoto stated:

> "Kodak has . . . introduced a new Pocket Camera that obsoletes existing Pocket Cameras and our inventory and suppliers of 110 Pocket Cameras are in jeopardy . . . [W]e must follow Kodak's lead and introduce a new Pocket Camera as soon as possible" (E2941).

Interphoto's annual report for the year ending February 29, 1976 attributed its decline in sales to "late delivery of products imported from the Far East" (E2994). Testimony established that the products referred to were 110 flipflash cameras that petitioners had arranged to obtain under the extreme time pressures created by respondent's conduct (S1324-1327).

properly interpreted as manifesting the belief that respondent's violation had not harmed petitioners.[21]

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21. As noted in the text none of the contemporaneous documents stated that petitioners had not been injured by respondent's violation. The Court's reliance then is on the citing of other difficulties in the documents and the failure in *some* of them to refer to respondent's unknown violation as a contributing factor. It is clear, however, that the fact that the authors of particular documents stated that petitioners were experiencing specified difficulties does not mean that they regarded the factors specified as the exclusive cause of petitioners' injury. Moreover, these various factors were interrelated so that the mention of one implies the importance of another — in particular Kodak's introduction of the 110 flipflash camera. Thus for example testimony by petitioners' chief financial officer, who prepared the 1976 annual report makes it clear that the reference to the adverse consequences resulting from the loss of the previous "lead" product, the Yashica 35mm camera, incorporates as an essential premise that the petitioners were unable to replace the Yashica 35mm camera with the Argus 110 magicubecamera as their new lead product because it had been obsoleted by flipflash (S1323, 1324). Judge Pollack had found petitioners' chief financial officer to be "competent" and stated that he had "a high regard for his credibility" (S1197, 1299).

It should also be pointed out that at the time these contemporaneous documents were prepared petitioners'officers and employees were not aware that respondent had violated the antitrust laws. Thus the introduction of the Kodak 110 camera was viewed as a normal competitive event to which petitioners had to respond (S1324-1325).

The court below also placed great reliance on an answer to respondent's interrogatories which indicated that respondent's violation did not damage petitioners until the Kodak 110 camera gained "significant market acceptance . . ." The answer further asserted that damage from new product introductions "generally occurred at least one year following the commencement of widespread marketing to the consuming public" (P96). The Court interpreted this language to mean that *no* injury was suffered prior to this date.

This answer was filed at a time when discovery had been limited by court order to respondent's defense that petitioners' claims were time-barred. Within the context of this issue a party is "injured" only after the

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The second technique employed by the court below was to disregard evidence offered by petitioners. This evidence consisted of (1) contemporaneous documents demonstrating that petitioners were damaged by respondent's violation,[22] (2) contemporaneous

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damages suffered are no longer "speculative" and, consequently, "unprovable." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971); Argus, Inc. v. Eastman Kodak Company, supra* at 594. It was in this sense that the answer to interrogatory placed the date of injury substantially after the introduction of the product. It is plain, moreover, that the statement could not be deemed to mean that petitioners believed they suffered *no* injury prior to the gaining of "significant market acceptance" by the Kodak 110 camera. Obviously, the only way a product gains "market acceptance" is by displacing competitive products. During the process of gaining a larger share, it must capture sales from its competitors until it reaches the point characterized as "significant."

22. *See* documents referred to in footnote 20, *supra*. Petitioners also offered the 1975 business plan of Interphoto as evidence showing the profits which would have been earned if respondent's violation had not occurred (E1001-1039). The evidence indicated that the estimates of expected sales in Interphoto's business plans had been substantially accurate in prior years (E2066). Indeed the plan was also accurate for the first quarter of fiscal year commencing March 1, 1975, prior to the marketing of the Kodak 110 flipflash camera (E2066). The court below nevertheless gave no weight to the plan, dismissing it as having "an air of unreality" (7a, n. 1). The estimates contained in the plan, thus dismissed as "unreal" by the court below, were relied upon by fourteen knowledgeable people to invest in the company, and to continue their employment and in one important case, to commence employment with the company (S387-395, 405-408, 416-426, 373-384, 1190-1194); the management of the company to make the requisite personnel, organizational, product procurement and merchandising decisions (S698-715, E1001-1039); and the firm providing the financing for all the activities of the company to determine what credit would be supplied and the terms on which it would be made available (S1256, 1257, 1261, 1262, 1266). Thus, highly knowledgeable and experienced people manifested their belief in the "reality" of the estimates in the most convincing fashion possible: they actually risked their money [The amount was substantial to many of them in light of their financial position (S991-992, 435-436, 421-422)] and their careers in reliance upon the estimates. Moreover, in light of the large debt and preferred
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actions by petitioners' management which demonstrate petitioners' injury[23] and (3) testimony not only from petitioners' officials, but from customers, competitors, suppliers and lenders, as to the consequences resulting from respondent's violation.[24]

(Cont'd)
stock (E2944, 2956-2957; S484-485, 1190-1191) only anticipation of profits of the magnitude forecast in 1975 would have made it "plausible" for the purchasers to pay as much as $400,000 for the common stock; and management had taken steps designed to achieve such profitability (S1314-1317, 334-337, 377-379, 477-485; E73-75, 959-963, 2941, 2984-2985). The sales actually made in the period covered by the plan met management's projections until the Kodak 110 flipflash camera was marketed, when sales fell far below the projected levels (E1003, 2066; S69).

23. Petitioners met with Haking, and other companies in an effort to obtain 110 flipflash cameras incorporating petitioners' design features as quickly as possible, and chose Haking for this reason (S721-723, 805-806, 828-831, 867-869, 885-887; E183-186). Interphoto was one of the first companies to market 110 flipflash cameras after Kodak. (S1133-1134, 1071-1076, 1173, 1022, E81). When flipflash was introduced, since it obsoleted Argus' 110 magicube cameras, petitioners suspended work on Argus' project on which it had spent over $400,000 to develop an Argus 110 magicube camera which would reduce the severity of "red-eye" (S752-753, 815-816, 828-830; E1645).

24. *Customers*

Due to Kodak's introduction of flipflash, (i) Woolworth's stopped buying Argus 110 magicube cameras (S967-975); (ii) S.E. Nichols only bought such cameras at "closeout" prices (S1093-1094, 1558, 1570) and refrained from buying accessory items for 110 cameras (17a-18a; S1088, 1096-1097); and (iii) Marvel Photo stopped buying Argus 110 magicube cameras and reduced its total product purchases from Interphoto (S906-912, 1563-1565).

Competitors

Flipflash obsoleted magicube, and GAF and Vivitar sold off their 110 magicube inventory at closeout prices (S1054-1055, 1070-1071, 1380, 1385, 1390).
(Cont'd)

Thus the court's approach to the evidence offered, first creating its own view of a "factual context" by selecting certain evidence and drawing conclusions from it, and then turning to contrary evidence offered by petitioners with an attitude of skepticism, was wholly inconsistent with the appropriate function of a court determining a motion for summary judgment.

The court's approach, in weighing the evidence and placing a heavy burden of persuasion on petitioners, is also inconsistent with the underlying rationale of a substantial body of antitrust authority. These decisions make it clear that it is necessary to grant extreme latitude to plaintiffs in the proof of damages

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Suppliers

Major suppliers who participated in Interphoto sales calls and promotional tours compared Interphoto's circumstances in early 1975 and early 1976: "There was a complete reversal" by early 1976; they began preparations to reduce Interphoto's exclusive distributorship to a co-distributorship (S409-415, 471-476, 953-954).

Lender

The Vice President of Walter E. Heller & Co., Interphoto's lender testified to the severe damage sustained by Interphoto commencing in 1975:

> " . . . Sales, which had been pretty much on the mark during the first quarter [prior to Kodak's marketing of 110 flipflash cameras], disintegrated for the rest of year versus budget, and from that point on, the company seemed to be almost inevitably in a liquidation mode" (S1265-1266).

Interphoto never exceeded the $17.5 Million in sales it achieved in 1975, and Interphoto never earned a profit thereafter (S69, 75). For the ten-year period prior to 1975, it had averaged over $41 Million in sales and the lowest sales level achieved in that period was in 1970—$33.1 Million (S69). Its lender-approved business plan for 1975 projected sales of $32.5 Million.

precisely because natural and inevitable uncertainty as to the magnitude of damages suffered by plaintiffs is the result of defendant's own wrongdoing.[25] It is indeed difficult to know exactly how much the world would have been different if defendant had not violated the law. Antitrust violators should not, however, benefit from the uncertainty they create. If, as is plainly the case here, there is no doubt that a plaintiff is materially worse off because of defendant's anticompetitive conduct, then the action should go forward and an appropriate determination of plaintiff's damages be made at trial.[26]

III.

THE COURT OF APPEALS ERRED IN REQUIRING PETITIONERS TO ESTABLISH THAT RESPONDENT'S VIOLATION WAS THE EXCLUSIVE CAUSE OF PETITIONERS' INJURY, IN ORDER TO AVOID ENTRY OF SUMMARY JUDGMENT DISMISSING THE COMPLAINT.

The final element in the court's approach which led it to affirm the District Court's grant of summary judgment was its treatment of the causality issue. In simple terms, the fact that other factors may have been harmful to petitioners does not mean

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25. *Eastman Kodak Company of New York v. Southern Photo Materials Company*, 273 U.S. 359 (1927); *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Zenith Radio Corp. v. Hazeltine Research Inc.*, *supra*, at pp. 123-125. As Judge Posner recently stated citing *Story*: "Speculation has its place in estimating damages, and doubts should be resolved against the wrongdoer." *Olympia Equipment Leasing Company v. Western Union Telegraph Company*, 797 F.2d 370, 383 (7th Cir. 1986).

26. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, *supra*; *Bigelow v. RKO Radio Pictures, Inc.*, *supra*; *Story Parchment Co. v. Patterson Parchment Paper Co.*, *supra*.

that petitioners were not harmed by respondent's violation.[27]

The most striking example of this is with respect to the question of the importance of the internal flash camera as a substitute for flipflash. The court charges petitioners with ignoring "the popularity of the internal flash in asserting that the 110 magicube would have been a powerful lead product but for the flipflash" (15a).

The most that can be said against petitioners' damage claims, however, is that the "popularity" of the internal flash reduced the demand for external flash cameras to some extent. But as the court itself notes Kodak sold over four million external flash cameras in 1975 (15a), only slightly less than it had sold the previous year.[28] Thus while the internal flash made inroads it hardly obsoleted the flipflash camera. Petitioners have no quarrel with the proposition that they are entitled only to those profits which they would have earned if the demand for flipflash was exactly as it was, including whatever diminution in demand was caused by the internal flash.[29] But to say that less might

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27. An antitrust violation is not required to be the exclusive cause of a plaintiff's injury. *Zenith Radio Corp. v. Hazeltine Research, Inc., supra* at p. 114, n. 9; *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1961).

28. Moreover, over 3.2 million of these external flash cameras were 110 flipflash cameras, even though they were not marketed by Kodak until the middle of June (S87; E2174). Kodak cannot claim that had it marketed 110 flipflash cameras earlier in 1975 that its unit sales would not have been higher than during the previous year. In addition, an analysis of unit sales, without any consideration as to the prices achieved, is misleading. Kodak was able to obtain substantially higher prices for its 110 cameras in 1975 (E2065).

29. Testimony established that internal flash made inroads *because of* flipflash, since when Kodak was back-ordered on flipflash, retailers had to turn

(Cont'd)

have been earned because internal flash cameras were introduced is a far cry from saying that there was so little demand for 110 external flash cameras that Argus' 110 camera could not have functioned as Interphoto's lead product.

The same error in applying this "either-or" approach infects the court's reasoning with respect to the other "unfavorable" factors relied upon by the court. Petitioners' relationships with certain of its suppliers had admittedly been terminated; they had suffered some losses in previous years; the organization of Interphoto had been substantially changed to enhance efficiency and the cost of capital was high. What must be remembered, however, is that in late 1974, with complete knowledge of all these factors, fourteen of petitioners' own managers purchased stock in Argus, key employees joined or continued with the petitioners, and the supplier of credit committed itself to providing needed financing. This was done on the basis of projected sales and profits in the business plan which took all of the "unfavorable" factors into account. The one "unfavorable" factor which could not be taken into account in the projections was respondent's violation, for this was a fact which could not be known (S476-500, 1100-31, 1194-5-1194-9, 1197-1202). Petitioners are entitled to the profits they were deprived of because of *this* "unfavorable factor"—respondent's violation of the antitrust laws.

Petitioners' right to have a jury determine the proper amount of the damages caused by respondent's antitrust violation was clearly proclaimed in the leading *Story Parchment* case:

(Cont'd)
to internal flash cameras, rather than the obsoleted external flash magicube cameras (S967-970, 1086, 427-430). Testimony established that going into 1975, external and internal flash 110 cameras were both viable products (S427-430). Indeed, in 1974, Kodak's external flash amateur still cameras had 75% of that market (S88, 89). A very large portion of that market was 110 cameras.

"[T]he court below, after referring to evidence tending to show that petitioner was not in thriving financial condition, said that petitioner was without capital to meet the situation which it faced, even if there had been no conspiracy and there had been open competition; and that its failure was inevitable either from lack of capital or inefficient management or both. The court therefore, concluded that petitioner had not sustained the burden of proving that the depreciation in value of its plant was due in any measurable degree to any violation of the Sherman Act by the respondents but this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury without usurping the functions of that fact-finding body. *Whether the unlawful acts of respondents or conditions apart from them constituted the proximate cause of the depreciation in value, was a question, upon the evidence in this record, for the jury 'to be determined as a fact, in view of the circumstances of fact attending'* " 282 U.S. at p. 566. (Emphasis supplied.)

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A—DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 8, 1986

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 670—August Term, 1985

(Argued January 6, 1986 Decided September 8, 1986)

Docket No. 85-7549

ARGUS INCORPORATED AND INTERPHOTO CORPORATION,

Plaintiffs-Appellants,

—v.—

EASTMAN KODAK CO.,

Defendant-Appellee.

Before:

FEINBERG, *Chief Judge*,
FRIENDLY,* and WINTER, *Circuit Judges*.

* Judge Friendly participated in the oral argument in this case and voted before his death on March 11, 1986, in favor of the disposition reached in this opinion.

Appendix A

Appeal from a grant of summary judgment in the United States District Court for the Southern District of New York, Milton Pollack, *Judge*, dismissing antitrust claims predicated on the conduct found to be an antitrust violation in *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). We affirm on the ground that defendant did not cause the damages claimed by plaintiffs.

Affirmed.

DAVID R. TAXIN, New York, New York, (Earnest Allen Cohen, Marchi Jaffe Cohen Crystal Rosner & Katz, New York, New York, of counsel), *for Plaintiff-Appellant Interphoto Corporation.*

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ABNER P. SLATT, New York, New York, *for Plaintiff-Appellant Argus Incorporated.*

ROBERT MACCRATE, New York, New York (John L. Warden, William L. Farris, Marcy Engel, Sullivan & Cromwell, New York, New York, of counsel), *for Defendant-Appellee.*

Appendix A

WINTER, *Circuit Judge*:

This action involves a claim based on the conduct of defendant Eastman Kodak Corporation ("Kodak") held to be an antitrust violation in *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 301-04 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). It was brought by Argus Incorporated ("Argus"), a licensor of the trademark "Argus" for use on camera equipment, and Interphoto Corporation ("Interphoto"), a wholesale distributor of cameras and camera equipment controlled by Argus. They seek monetary damages under the Clayton and Sherman Acts, 15 U.S.C. §§ 1, 15(a) (1982). Plaintiffs appeal from Judge Pollack's granting of Kodak's motion for summary judgment. 612 F. Supp. 904 (S.D.N.Y. 1985). Because a reasonable trier of fact could not find that Kodak caused the damages claimed by Argus and Interphoto, we affirm.

1. *History and Prior Proceedings*

This case involves the evolution of new flash devices for cameras. In 1965, Kodak introduced the flashcube, a four-sided device that rotated after each shot, allowing four flash pictures to be taken without changing flashbulbs. The next innovation, the magicube, was introduced in 1970. The magicube resembled the flashcube but did not require batteries. However, the flashcube and the magicube suffered from a problem known as "red-eye," which produced red dots in the eyes of the photographer's subject. In 1972, Kodak contracted with General Electric Company to develop a new flash device that would eliminate "red-eye." The agreement forbade disclosure of the project's existence or progress to other lamp or camera manufacturers ("confidentiality agreement"). On

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April 10, 1975, Kodak and General Electric announced the new product, the flipflash, along with two compatible versions of the Kodak 110 amateur pocket camera. Flipflash moved the flash away from the lens center to eliminate "red-eye" and included a new method to ignite the flash lamp, the "piezo crystal system." Because the flipflash could not be used with cameras designed for the flashcube or magicube and because the confidentiality agreement ensured that Kodak's competitors would not begin to develop compatible cameras before the Kodak announcement, Kodak had no significant competition in flipflash cameras for several months after the announcement. Meanwhile, however, other companies had begun in 1974 to market a 110 camera with an internal flash. Interphoto and Kodak did not begin to sell such cameras until 1976 and 1978, respectively.

The confidentiality agreement between Kodak and General Electric with regard to flipflash was the basis for the successful antitrust claim in *Berkey*. Berkey charged that, although Kodak did not make any meaningful contribution to the development of flipflash, the confidentiality agreement with General Electric prevented other camera makers from competing in the production of cameras compatible with flipflash. The jury found that the confidentiality agreement violated Section 1 of the Sherman Act. We affirmed. 603 F.2d at 304.

Plaintiffs filed the present action on August 27, 1979, two months after we decided *Berkey*. The complaint alleged numerous claims against Kodak, most of which have disappeared from the case. The parties have stipulated that "no recovery shall be had for any damages sustained prior to April 10, 1975," the date Kodak and General Electric announced the flipflash. Plaintiffs have

also waived all claims against Kodak except those "for damages sustained by reason of the [Confidentiality] Agreement." Plaintiffs' claim, as now asserted, is thus based solely on the secrecy of the flipflash development.

Prior proceedings have also clarified Kodak's defenses. Judge Gagliardi, who was originally assigned to this case, held that Kodak was collaterally estopped to deny the violation of Section 1 of the Sherman Act. *Argus Inc. v. Eastman Kodak Co.*, 552 F. Supp. 589, 605 (S.D.N.Y. 1982). No issue is taken with his ruling on this appeal. Kodak also abandoned its statute of limitations defense to the flipflash claim and entered into the stipulation regarding the damage period described *supra*.

The issues as narrowed are twofold. First, did the secrecy of the flipflash development cause the damages claimed by Argus and Interphoto? Second, do the plaintiffs have standing to raise this claim under applicable antitrust doctrine? After Kodak moved for summary judgment, Judge Pollack answered both questions in the negative. He found that neither plaintiff had shown, "by specific probative evidence, the existence of standing to sue or a proximate causal link between the violation and the alleged injuries." *Argus Inc. v. Eastman Kodak Co.*, 612 F. Supp. 904, 906 (S.D.N.Y. 1985). He also held that the damage claims were too speculative to support a recovery. *Id.* at 923. Plaintiffs appeal from this judgment. Because we agree with the district court that plaintiffs failed to present a triable issue of fact on the element of causation of the particular damages claimed, we do not reach the standing issue.

Appendix A

2. *Plaintiffs' Claim for Damages*

At all pertinent times, Interphoto, which was controlled by Argus, was a wholesale distributor of a wide range of photographic equipment, including a 110 magicube camera marketed under the "Argus" name. Argus licensed its trademark to Interphoto. Interphoto in turn purchased cameras and other photographic equipment, labeled them "Argus," and resold them to retailers. Interphoto paid Argus a 1.5% royalty on all Interphoto sales of "Argus" merchandise.

Plaintiffs' claim for damages posits the following scenario. Interphoto had built its business plan for 1975 around the promotion of the Argus 110 magicube camera as its "lead product." (The Argus 110 was to have replaced the Yashica 35 millimeter camera in this role.) A lead product, or "lead line," is a distinctive item of sufficient popularity to cause buyers, here retailers of camera equipment, to purchase both it and other more fungible products offered by the wholesaler. But for the lead line these latter sales would not be made. As a result of the introduction of Kodak's 110 flipflash camera, 110 cameras using magicube flash systems, such as the Argus 110, were made obsolete. Moreover, the secret development of the flipflash and compatible Kodak camera prevented Interphoto from offering a flipflash camera as a "lead line" until after the 1975 Christmas selling season. Interphoto thus lacked a popular lead line camera at a critical moment and suffered as a consequence a decline in sales of its entire range of products. A downward spiral in Interphoto's business followed as customers, salesmen, suppliers, and creditors took their trade elsewhere. Interphoto was forced into "liquidation mode" and, in 1980, out of the wholesale photographic business.

Appendix A

Argus' claim is entirely derivative of Interphoto's claim, namely that the damage done to Interphoto's sales of the entire line of Argus-brand photo equipment deprived Argus of trademark royalties that it had expected to earn.

In March 1984, the parties entered into a stipulation that plaintiffs would supply "a form of pretrial order setting forth," *inter alia*, "a statement of factual contentions they intend to prove, including damages theories and contentions." Plaintiffs then provided estimates of what Interphoto's total sales, Interphoto's sales of Argus products, Interphoto's total and Argus-related profits, and Argus' royalties would have been absent the confidentiality agreement.[1] Because Interphoto did not specify a contention as to what portion of its total alleged lost profits reflected losses in sales of Argus 110 magicube cameras, the item in direct competition with the flipflash, it abandoned any claim of damages for loss of 110 sales alone. Similarly, lost profits from lost sales of other individual products of the line were not specified.

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1 These projections were not pessimistic. Actual Interphoto sales for the fiscal year ended February 29, 1976, the year flipflash was introduced, were $24.5 million; plaintiffs estimated that in the absence of flipflash, Interphoto's sales for that year would have totalled $32.5 million, and sales would have increased to $136.8 million by the fiscal year ended February 28, 1985. Plaintiffs estimated that lost Interphoto profits in the fiscal year ending in February 1976 were $2,748,000. Estimates of Interphoto's lost profits steadily rise to a total for fiscal year 1985 of $9,747,000. Interphoto's total lost profits during the ten years are said to be $53,478,000. Argus' lost royalties from Interphoto's sales of Argus-brand products were estimated at $88,000 for 1975, up to $666,000 by 1984, with a ten-year total of $3,450,000. Given the moribund financial circumstances of Interphoto and Argus when the flipflash was introduced, described *infra*, these estimates have an air of unreality.

Plaintiffs' contentions as to damages thus consist solely of lost profits on sales of Interphoto's and Argus' entire line of products, resulting in their commercial demise. The only damage award a trier of fact could make on the basis of plaintiffs' contentions, therefore, is for that entire line, not for any lesser claim for lost profits on particular items in the line. Essentially, therefore, we must thus decide whether Kodak's actions caused the destruction of plaintiffs' businesses.

3. *Discussion*

Causation in fact is, of course, a necessary element of any claim for relief under Section 4 of the Clayton Act, 15 U.S.C. § 15, which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor." Discussions of the causal nexus between economic injury and an antitrust violation may also implicate issues such as standing or proximate cause since not every party injured may assert an antitrust claim. *See, e.g., Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535-36 & n.31 (1983). However, lack of causation in fact is fatal to the merits of any antitrust claim. *Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co.*, 510 F.2d 1140, 1142 (2d Cir.), *cert. denied*, 421 U.S. 1011 (1975). Consequently, an essential element in plaintiffs' claim is that the injuries alleged would not have occurred *but for* Kodak's antitrust violation.

The district court held that there was insufficient probative evidence of causation in fact to warrant submission to a trier of fact of plaintiffs' claims of lost profits on their entire lines and of the ultimate destruction of their

businesses. 612 F. Supp. at 927. We review this decision in light of the familiar rule that Interphoto and Argus are "to be given the benefit of all reasonable doubts in determining whether a genuine issue of material fact exists." *Reading Industries v. Kennecott Copper Corp.*, 631 F.2d 10, 13 n.6 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981). *See also United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Bailey v. Hartford Fire Insurance Co.*, 565 F.2d 826, 830 (2d Cir. 1977). Of course, "mere conjecture or speculation by the party resisting summary judgment does not provide a basis upon which to deny the motion," *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985), and a party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 54 U.S.L.W. 4319, 4322 (1986). Moreover, "[w]hen the fact of injury is in issue, the 'isolated self-serving statements' of a plaintiff's corporate officers may not provide substantial evidence upon which a jury can rely." *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 247 (5th Cir. 1978) (quoting *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1371 & n.25 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977)); *accord Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714 (11th Cir. 1984). Finally, the required showing is heightened when the "factual context renders [a] claim implausible." *Matsushita*, 54 U.S.L.W. at 4322. In such circumstances, "more persuasive evidence . . . than would otherwise be necessary" must be adduced. *Id.*[2]

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2 Judge Pollack ordered an evidentiary hearing on defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 43(e), which provides:

(footnote continued on following page)

Appendix A

We have reviewed the record and have concluded that there is no genuine issue of fact with regard to whether the flipflash confidentiality agreement caused Interphoto's and Argus' commercial demise.[3] We begin our discussion of the evidence with the contemporaneous explanations proffered by Interphoto's management for the severe financial difficulties the company experienced. The failure of a business' management to note at the time what is later claimed by its lawyers to have been a mortal commercial wound weighs heavily against such a claim. *See Copy-Data Systems, Inc. v. Toshiba America, Inc.*, 755 F.2d 293, 300-01 (2d Cir.), *cert. denied*, 106 S.Ct. 80 (1985). It is thus a telling blow to plaintiffs' lead line, destruction of business theory that Interphoto's contemporaneous accounts of the reasons for its economic ailments consistently contradict its present position.

(footnote continued from previous page)

> When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

Rule 43(e) can be used to hear motions for summary judgment. *State of Utah v. Marsh*, 740 F.2d 799, 801 n.2 (10th Cir. 1984). *See also Argus*, 612 F. Supp. at 908 n.2 (citing cases); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2723, at 61 (2d ed. 1983); *Burham Chemical Co. v. Borax Consolidated Ltd.*, 170 F.2d 569, 573 (9th Cir. 1948), *cert. denied*, 336 U.S. 924 (1949). When the motion for summary judgment was made in the instant case, the record consisted of an enormous mass of documents, and the district court was well within its discretion to conclude that a hearing would allow the court to assess the record expeditiously and accurately.

3 Plaintiffs invoke *Klinger v. Baltimore and Ohio Railroad Co.*, 432 F.2d 506, 516 (2d Cir. 1970), for the proposition that a wrongdoer whose acts create uncertainty bears the burden of proof on causation as well as on the quantum of damages. Assuming this dictum is the law and that it applies in a case where the uncertainty is as much the result of the theory of damage selected by the plaintiffs as of the acts of the defendant, shifting the burden would not affect the outcome in the instant case.

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Interphoto's Annual Reports and Form 10-K's, including those for the fiscal year ending February 29, 1976, which included the ten months following the flipflash announcement, explained dismal sales and financial results without ever mentioning competition with the flipflash. These reports emphasized such factors as: "substantial operating losses in the non-photographic operations"; "the discontinuance effective February 28, 1975 of the distribution of Yashica cameras, which had accounted for approximately $11 million of 1975 [March 1974 to February 1975] sales"; "the general depression in retail photographic sales"; and "late delivery of products imported from the Far East." On November 11, 1975, following the Christmas selling season so crucial to the plaintiffs' lead line theory (the wholesale Christmas season is of course earlier than the retail season), the president of Interphoto explained to its board of directors why sales were not "up to forecast." He never mentioned flipflash. Instead, he reported, "The only valid excuse we have is that we were not able to get our fall goods on time. [Letters of credit] were not available until late in August." The unavailability of letters of credit was due to credit restrictions imposed as a result of Interphoto's already precarious financial condition.

Interphoto's 1975 Annual Report (dated May 28, 1975) speculated: "Kodak has again introduced a new Pocket Camera that obsoletes existing Pocket Cameras and our inventory and suppliers of 110 Pocket Cameras are in jeopardy." However, that statement evidenced concern only about sales of 110 cameras, not about a devastating lead line effect. The next annual report, written when the flipflash's actual competitive effect was known, and after the alleged mortal wound administered, made no reference at all to flipflash.

Three years later, the 1979 Annual Report did, however, contain the following statement: "Ever since the Bell & Howell and Fotomat settlements with Kodak were completed and the Berkey and GAF suits were filed, we have been searching for the means of entering the antitrust fray. We believe that our case is better than the two settlers and the two litigators."

This "search" of course led to the instant litigation. The lead line theory was not advanced in the litigation, however, until it became tactically convenient. Thus, the lead line claim emerged only after a ruling by Judge Gagliardi made it clear that plaintiffs' only viable antitrust claim involved the flipflash confidentiality agreement and that it was not time barred. Prior to that time, when there was a danger that the events of April 1975 might be time barred and other theories of liability seemed feasible, plaintiffs had contended that competitive injury from flipflash did not begin until after the innovation had gained "significant market acceptance," a date plaintiffs said was about a year after its introduction, or April 1976. This position is of course at odds with their present assertion that flipflash "mortally wounded" Interphoto in 1975. Brief of Appellants at 23.

Against this background of contemporaneous evidence inconsistent with present claims and of varying damage theories in this litigation, we turn to a more detailed examination of plaintiffs' present claim.

We begin with an overview of Interphoto's and Argus' financial condition. Interphoto's photographic distribution business had been in severe decline well before the announcement of flipflash in April 1975. In the three years ending February, 1975, it had total losses of over

$7.2 million in photographic business and over $22 million overall. It had lost much of its share of the wholesale photographic market. Its share of the "gross national photo product" declined from 1.84% in 1965, to 0.88% in 1973, to 0.58% in 1974. Argus, by the time of the flipflash announcement, had reduced its photographic business to licensing its trademark to Interphoto.

During this time, Interphoto had difficulty maintaining suppliers. Yashica had provided Interphoto with sales of over $8 million in 35 millimeter and 110 camera sales in 1974, including 84.3% of Interphoto's 110 camera sales. Interphoto announced the termination of its exclusive distribution relationship with Yashica on January 1, 1975, and Yashica soon established its own United States distribution network. This caused a decline in Interphoto's sales of 35 millimeter cameras from $7,624,000 in 1974 to $1,224,500 in 1975. Interphoto's other suppliers of 35 millimeter and movie cameras, Cosina and Petri, also ceased to fill their previous roles. A supply agreement with Cosina, in effect since 1969, was cancelled in early 1974. As described by Interphoto's president, the final discontinuation of Petri occurred on December 1, 1975, "after many months of difficulties." In September 1974, Interphoto also ceased doing business with Sedic, its sole other supplier of 110 cameras, because Sedic was in financial difficulty. In addition, plans for Argus to cooperate in manufacturing a pocket camera with the Maurer Commercial Products Corporation collapsed by the end of 1974.

At the time of the flipflash announcement, therefore, Interphoto had no supplier of 110 cameras and had ordered no such cameras for over six months. Interphoto also had lost its supplier of its then lead line product, the

Yashica 35 millimeter cameras. Moreover, the total number of suppliers represented by Interphoto fell from 100 to 50 in the year ending February 28, 1975. At that time, Interphoto had merged its two sales divisions into one, closed three of its seven warehouses, and reduced its sales force from 125 to 60.

Whereas in 1970 Interphoto borrowed at the prime rate without need of security, by the end of 1974 it had to resort to paying 6% over the prime rate and to pledging all its assets as well. Moreover, the expected future returns from Interphoto's business were not highly valued by those in the best position to know. Several months prior to the flipflash announcement, in response to the financial difficulties of the principal Argus shareholder, Michele Sindona, various officers and employees of Argus agreed to purchase 64% of Argus' outstanding common stock for $400,000. Because Argus at that time owned 80% of Interphoto, the combined value of the two companies shortly before the flipflash announcement was thus in all likelihood less than $1 million, hardly candidates for the robust economic future ($2.7 million in profits for Interphoto in that fiscal year) depicted in plaintiffs' damage estimates. *See* note 1, *supra*.

When the flipflash announcement was made, Interphoto and Argus were wallowing in deep financial trouble, were steadily contracting their businesses, had lost their lead line product, the Yashica 35 millimeter camera, and lacked even a supplier for their projected new lead product, the Argus 110. The implausibility of the claim that but for the flipflash announcement, Interphoto would have earned $2.7 million in the fiscal year ending February 1976 seems self-evident.

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Moreover, the destructive role attributed to the flipflash by plaintiffs greatly exaggerates its marketing power. Kodak's sales of 110 cameras actually declined from 4,168,000 units in 1974 (pre-flipflash), to 4,077,000 in 1975 (post-flipflash), to 3,238,000 in 1976. Kodak's share of the amateur still camera market declined from 75% in 1974, to 70% in 1975, to 59% in 1976. The reason for this decline was that consumers generally preferred the new internal flash cameras over both the flipflash and the magicube. For instance, Vivitar entered the 110 market with its internal flash cameras in 1974, and by 1976 was the second largest seller of 110 cameras.

Plaintiffs ignore the popularity of the internal flash in asserting that the 110 magicube would have been a powerful lead product but for the flipflash. When flipflash cameras were out of stock during the 1975 selling season, retailers chose to buy 110 internal flash cameras over 110 magicube cameras, concrete evidence that the latter was not "obsoleted" solely by the flipflash. Indeed, when Interphoto began to sell both internal flash and flipflash cameras in 1976, its internal flash sales exceeded its flipflash sales. Moreover, the number of 110 magicube cameras sold by Interphoto was greater in 1975 than in 1974, although the dollar value of 110 sales declined.[4] The truly sharp decline was in Interphoto's sales of 35 millimeter cameras, from $7.6 million to $1.2 million over the same period.

Argus' and Interphoto's causality claims are thus thoroughly implausible and cannot survive a motion for

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[4] Total sales of 110's by Interphoto *and* Argus declined somewhat from 1974 to 1975. However, Argus sold some 110's in 1974 through wholesalers other than Interphoto. In 1975, all of Argus' 110 sales were through Interphoto.

summary judgment absent persuasive evidence rebutting the facts discussed *supra*. *See Matsushita*, 54 U.S.L.W. at 4322. Such evidence has not been forthcoming.[5] The testimony in support of the lead line theory consists largely of conclusory statements by plaintiffs' officers and employees. *See H & B Equipment Co.*, 577 F.2d at 247. For example, one such witness testified that "a new development was announced [in April 1975] which basically obsoleted Argus' line of cameras" and "made Interphoto . . . a secondary source and would have reduced or did reduce the sales dramatically, and the salesman's ability to sell." Similarly, another testified that during the 1975 Christmas selling season, his sales people reported:

5 Plaintiffs contend that various cases, most notably *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1242 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984), require us to give credence to their lead line theory of causation. These cases, they claim, stand for the proposition that "an antitrust plaintiff is entitled to recover the total losses of an entire business or division and the loss of profits it would have earned from all products and operations of that business or division but for its termination where an injury caused to one or more products and operations by the defendant's antitrust violation forced such termination." Appellants' Brief at 36. Plaintiffs add: "A distributor who loses 'follow-on' sales based upon lack of a significant product because of a wrongful termination of a distribution arrangement is in the same position as one who loses 'follow-on' sales based upon loss of economic viability of a significant product caused by a secrecy conspiracy." *Id.* at 62 n.154.

We may readily agree that these cases permit recovery of damages on a lead line theory. They do not, however, dispense with the requirement that the evidence support such a recovery. Each of the cases mentioned involved a much more direct evidentiary connection between the lead line product and the asserted loss of sales of an entire line than in the present case. For example, in many of these cases, suppliers terminated a distributor's right to sell a well-known, branded product with, as the district court noted, a "documented 'door opener' effect." 612 F. Supp. at 920. *See Spray-Rite*, 684 F.2d at 1241-42; *Greene v. General Foods Corp.*, 517 F.2d 635, 663-64 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976); *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 447 F. Supp. 867, 878 (S.D.N.Y. 1978), *rev'd on other grounds*, 602 F.2d 1025 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979); *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711, 723-24 (S.D.N.Y.), *aff'd*, 417 F.2d 621 (2d Cir. 1969).

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> Panic. They—we were in the middle of a season without a lead line at that point already, without something that was updated, or—well, which constituted our lead line of 110's—we had told them during our sales meeting that we would have a full line of 110's with our own product development . . . .
>
> And therefore when this hit, then the phone calls that kept coming into me in say August and September were that of panic and asking where was this camera that I spoke to them about, that we told them about, period.

Such testimony, unsupported by documentary or other concrete evidence of the supposed lead line effect, is simply not enough to create a genuine issue of fact in light of the evidence to the contrary. The lead line that had been lost was the Yashica 35 millimeter. Orders for the 110 were placed only after the flipflash announcement, and the "panic" in the August/September 1975 Christmas season was attributed at the time by Interphoto's president to the failure to acquire 110's in time because of credit difficulties, in his words, "[t]he only valid excuse." Finally, the relative popularity of internal flash cameras is ignored. This conclusory testimony falls woefully short of that necessary to outweigh the volume of contrary facts in the record.

Plaintiffs also offered the testimony of buyers for retailers who did business with Interphoto in 1975. Their testimony adds little in the way of rebuttal. One buyer testified that Interphoto sales to his company, including items other than 110 cameras, would have been higher in 1975 if Interphoto had offered a flipflash camera. How-

ever, these other items were "a camera case, a strap, things like that to go along with the camera," hardly evidence of an effect on the entire line of Interphoto products. Moreover, when he was asked about the impact of a "lead line product" on purchases of other products, he responded, "If you did not want to buy the salesman's number one item, I felt you would not buy or have a tendency not to buy the rest of the items in the line either." He was then asked, "Did that actually happen in 1975 so far as Interphoto was concerned?" He answered, "No. Not actually."

Another retailer was asked whether he reduced his 1975 purchases of any Interphoto product besides the Argus 110 magicube camera. He responded, "Yes, I did . . . Because I relied on Interphoto to be my first line next to Kodak and I suddenly wasn't getting what I needed and just turned to other distributors who I was only dealing in a smaller way with and I just opened the door to buy more products from them." This testimony fails to link the claimed dramatic collapse of Interphoto's entire product line to the competitive weakness of the Argus 110 or to link that competitive weakness to the flipflash rather than internal flash cameras. In fact, that retailer had never purchased Argus cameras prior to the introduction of the flipflash. Moreover, Interphoto sales records show that he purchased a wide variety of Interphoto products both before and after the announcement of flipflash. His testimony further indicates that the business lost by Interphoto went to other distributors who also lacked a flipflash camera.

Finally, we briefly address the testimony and submissions of plaintiffs' expert. He concluded that

> in 1975, Interphoto had a lead line product which had been obsoleted and was no longer marketable. This is precisely the type of "dramatic lead line product unavailability" referred to above, which can be traumatic to a company. There is no question in my judgment that this circumstance caused substantial damage to Interphoto and which damage has continued to date.

The district court properly found this naked conclusion to be unsupported and thus inadequate to rebut the volume of evidence to the contrary. *See Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 581 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982).

We affirm the grant of summary judgment. We do not rule on the Rule 11, Fed. R. Civ. P., issues because they are not before us in judgment form.

APPENDIX B—DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 27, 1985

ARGUS INCORPORATED and Interphoto Corporation,

Plaintiffs,

v.

EASTMAN KODAK COMPANY, et als.,

Defendants.

No. 79 Civ. 4525 (MP).

United States District Court,
S.D. New York.

June 27, 1985.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MILTON POLLACK, Senior District Judge.

This is an antitrust suit for violation of § 1 of the Sherman Act, claiming damages pursuant to § 4 of the Clayton Act for alleged injuries to the business or properties of the plaintiffs, Argus Incorporated and Interphoto Corporation.

The defendant, Eastman Kodak Company, has moved for summary judgment dismissing the amended complaint. Kodak contends that: 1) neither plaintiff has standing to sue under § 4 because neither plaintiff is a "person injured in his business or property by reason of anything forbidden in the antitrust laws";

2) neither plaintiff was engaged in the business—i.e., the camera manufacturing market—that was directly affected by the antitrust violation relied on; 3) neither plaintiff suffered an injury that was proximately caused by the antitrust violation asserted; and 4) neither plaintiff has presented evidence of damages that is sufficiently probative to be submitted to a jury.

In opposition to the defendant's motion, the plaintiffs have submitted 25 affidavits, 11 statements taken under Rule 26(b)(4), a Rule 3(g) statement sworn to by the President of Interphoto, Daniel A. Porco, 12 depositions, answers to interrogatories, all documents identified by both parties in their proposed pretrial orders, and the testimony of 18 witnesses. Many arguments have been briefed.

For reasons that appear below, the plaintiffs' claims will be dismissed because neither plaintiff has shown, by specific probative evidence, the existence of standing to sue or a proximate causal link between the violation and the alleged injuries. Even if plaintiffs had established standing to sue and proximate causation and were permitted to proceed to trial before a jury, most of their damage claims would have to be excised; the scope of cognizable damages would be limited to *de minimis* claims.

I. BACKGROUND

On April 10, 1975, Kodak and General Electric Company announced a new flash product, the flipflash, and a compatible new amateur pocket camera. These were technical advances over the 110 Pocket Cameras using magicubes to take flash pictures. Flipflash was a unique lighting system that moved the flash away from the lens center so that it eliminated the problem known as "red-eye" (i.e., red dots in the eyes of the photographed subject).

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Flipflash also used a unique method to ignite the flash lamp, the "piezo crystal system." Flipflash was developed over a period of years by General Electric Company and Kodak, in a joint development project. General Electric agreed, at Kodak's request, not to disclose flipflash to other camera manufacturers before the completion of the project and simultaneous public announcement of the flipflash and the Kodak cameras designed to use it.

Immediately upon announcement of the flipflash, Interphoto, a wholesale distributor of photographic equipment, set out to find a camera capable of incorporating a flipflash lighting arrangement; it looked to W. Haking Enterprises Ltd., a large Hong Kong camera manufacturer second in size to Kodak, which manufactures and sells cameras throughout the world. Haking had the capabilities necessary to turn out a flipflash camera promptly.

In May, 1975, Interphoto decided to buy a flipflash camera designed and offered for sale by Haking. Haking undertook to manufacture and sell the desired camera to Interphoto and to label it with the "Argus" name. (Argus previously had licensed Interphoto to use its trademark.) On July 16, 1975, Interphoto placed an order for 50,000 flipflash units, and Haking accepted the order on August 14, 1975. The delivery schedule called for a total of 28,000 units to be delivered in September, October, and November, in time for the Christmas retail season, with the remainder to be delivered in December through the following February. The price of the camera to Interphoto was $6.20; Interphoto's gross markup of 40% per unit was $2.48. In order to produce the camera, Haking had to change its existing tooling but was able to do so quickly. Haking also manufactured and sold flipflash cameras to other customers, each of whom labelled the product with its own brand name.

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Due to production delays, the flipflash cameras on the July 16th order arrived in October and November, 1975; 18,000 of the 28,000 expected were delivered and all were sold. Before the end of 1975, Interphoto received 10,000 additional flipflash cameras under an order placed on August 11, 1975.

During 1975, no one other than Kodak had substantial quantities of flipflash cameras. Consequently, camera dealers sold conventional cameras at a lower price.

By February, 1976, the cameras were readily available to Haking's customers, including Interphoto. By that time, ample quantities of the flipflash camera were in the market, and from then on there was no shortage of the cameras. Interphoto bought and distributed flipflash cameras thereafter, for years.

Interphoto claims that the unavailability of flipflash cameras during the 1975 Christmas selling season triggered an irreversible decline in its entire wholesale distribution business, causing it to cease operations in 1980. Argus claims that Interphoto's inability to sell Argus products cost Argus lost royalty payments.

II. CLAIMS

Plaintiffs base their claim of an antitrust violation solely on the determination in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980), that the secrecy agreement between General Electric and Kodak during the development of the flipflash unreasonably restrained competition in the manufacturing of amateur still cameras. The secrecy agreement gave Kodak a head start over other manufacturers after April 10, 1975 in offering a flipflash camera. The Second Circuit held

that the jury could "consider whether Kodak's refusal to permit . . . GE to disclose [its] inventions to other camera manufacturers was unreasonable." 603 F.2d at 304. *Berkey* was given collateral estoppel effect in this case. *See Argus Inc. v. Eastman Kodak Co.*, 552 F.Supp. 589 (S.D.N.Y. 1982) (Gagliardi, J.). The parties have stipulated that "no recovery shall be had for any damages sustained prior to April 10, 1975."[1]

Argus has elected to present only a single damage claim, sustained after April 10, 1975; it claims $3,450,000 of "lost" trademark royalties on "expected" *Interphoto* sales of the *entire* line of Argus-brand products for the ten-year period 1975-1985. Argus does not present any claims for its lost sales or inventory made obsolete; its claim is wholly derivative of Interphoto's damage claim.

Interphoto presents a single damage claim of $53,475,000 for ten years of "lost" profits on "expected" sales of its

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1. The parties also stipulated to the following:

> "D. Plaintiffs have waived all claims other than their claim against Eastman Kodak Company for damages sustained by reason of the Flipflash Agreement." . . .
>
> "I. Plaintiffs have waived any contention that any Kodak agreement with General Electric Company restrained or delayed the commercial introduction of Flipflash and shall not advance that contention at trial by evidence or argument." . . .
>
> "J. Plaintiffs' claim for relief is based solely on the secrecy of the Flipflash development, and the Court's present determination on collateral estoppel precludes Kodak from seeking to justify on commercial grounds the obtaining from General Electric of a commitment not to disclose the Flipflash prior to its introduction." . . .

entire line of photographic and non-photographic products. Interphoto contends that the flipflash secrecy agreement caused "direct damage" to its 126 and 110 camera sales and "indirect damage" to "expected" sales of the other products it distributed, or could have distributed, during the next ten years. Interphoto does not segregate its damages for lost camera sales; instead, it makes a global claim for lost sales of all photographic products. In short, Interphoto claims that its inability to offer flipflash—compatible pocket cameras as a "lead line" to its retail customers during the 1975 Christmas selling season started a chain reaction which caused it to go out of business five years later, in 1980.

Kodak contends that only firms that had invested in manufacturing 110 cameras using magicubes can assert the violation found in *Berkey* and claim damages compensible under Section 4 of the Clayton Act. It asserts that the plaintiffs' claims have nothing to do with camera manufacturing and that the violation found in *Berkey* had at most an indirect impact on plaintiffs' distribution and licensing businesses.

III. STANDARD FOR DECISION

This case is before the Court on Kodak's motion for summary judgment. Although the Supreme Court has counseled that "[s]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles," *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962), it has recognized that summary adjudication can have a significant role in antitrust litigation. As the Court stated in *First Nat'l Bank v. Cities Service,* 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968),

"While we recognize the importance of preserving

> litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

The Advisory Committee for the Federal Rules has stated that "The mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for a trial." To serve that purpose, a Court may use summary procedures to assay the alleged probative evidence of the plaintiffs in order to narrow the controverted issues to triable matters and to dispose of matters unsupported by admissible evidence. Rule 43(e), Fed.R.Civ.P., which authorizes the use of oral testimony on motions, is applicable to motions for summary judgment. *See State of Utah v. Marsh,* 740 F.2d 799, 801 n. 2 (10th Cir. 1984).[2]

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2. "Although Fed.R.Civ.P. 56 is silent on the point, Rule 43(e), which authorizes the use of oral testimony on motions generally, has been held to be applicable to motions for summary judgment." *Marsh,* 740 F.2d at 801 n. 2. *See also* 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2723, at 61 (2d ed. 1983) ("Rule 43(e), which authorizes the use of oral testimony on motions, has been held applicable to motions for summary judgment, even though Rule 56 is silent on the point."); 5 *Moore's Federal Practice* ¶ 43.13 (2d ed. 1984); *County of Oakland v. City of Berkley,* 742 F.2d 289 (6th Cir. 1984); *McGuire v. Columbia Broadcasting System, Inc.,* 399 F.2d 902, 907 (9th Cir. 1968); *Burham Chemical Co. v. Borax Consolidated, Ltd.,* 170 F.2d 569 (9th Cir. 1948); *Weber v. George Cook, Ltd.,* 563 F.Supp. 598 (S.D.N.Y. 1983); *Williams v. City and County of San Francisco,* 483 F.Supp. 335, 338-39 (N.D. Cal. 1979); *INA Aviation Corp. v. United States,* 468 F.Supp. 695 (E.D.N.Y. 1979); *Hazelgrove v. Ford Motor Co.,* 428 F.Supp. 1096, 1100-01 (E.D. Va. 1976).

The instant litigation presents a model for such treatment in light of the substantial discovery which has been had. *In limine* consideration of expert testimony and other evidentiary issues is far more efficient than deferring them until trial. In examining expert opinion *in limine*, the Court may consider the underlying assumptions, inferences drawn, and conclusions reached in order to determine whether the opinion would help the trier of fact to understand the evidence or determine the fact in issue.

The Court ordered a hearing to assay plaintiffs' evidence on the issues of standing to sue, proximate cause, and damages flowing from the antitrust violation. At the hearing, Kodak introduced a broad array of extrajudicial statements made by plaintiffs which appeared both in documents filed publicly pursuant to the requirements of law and in internal corporate minutes and records. Many of these statements were prepared by witnesses who gave oral testimony at variance with the documents.

The published and recorded extrajudicial statements are legal admissions. *See* 4 *Wigmore on Evidence* §§ 1048, 1057a (3d ed. 1940). *Cf. Student Public Interest Research Group v. Fritzsche, Dodge & Olcott, Inc.*, 579 F.Supp. 1528, 1538 (D.N.J. 1984). Once such statements were made part of the record, "the burden shifted to [respondents] to come forward with evidence disproving the correctness of th[e] report[s] or explaining error and mistakes in preparation of [them]." *United States v. Maritime Investment Corp.*, 465 F.2d 434, 436 (5th Cir. 1972).

The burden is not met by contradictory oral statements or speculations that are "unaccompanied by any direct evidence of reporting inaccuracies." *Student Public Interest Research Group*, 579 F.Supp. at 1538. Nor can plaintiffs rely on the conclusory

statements of its corporate officers or competitors. "When the fact of injury is in issue, the 'isolated self-serving' evidence of plaintiff's corporate officers may not provide substantial evidence upon which a jury can rely." *H & B Equipment Co. v. International Harvester,* 577 F.2d 239, 247 (5th Cir. 1978). *See also Yoder Bros, Inc. v. California-Florida Plant Corp.,* 537 F.2d 1347, 1371 & n. 25 (5th Cir. 1979), *cert. denied,* 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977) (conclusory statements of plaintiff's officers do not constitute substantial evidence). To defeat a motion for summary judgment, the respondent must adduce "factual material which raises a substantial question of veracity or completeness of the movant's showing or presents countervailing facts." *Beal v. Lindsay,* 468 F.2d 287, 291 (2d Cir. 1972) (Friendly, J.).[3]

As described in greater detail below, plaintiffs have not raised any genuine issue of material fact by acceptable factual evidence that contradicts or varies the documentary proof. Plaintiffs presented no probative evidence raising a substantial question about, or casting doubt upon, the veracity or completeness of the public documents, reports, and corporate minutes.

IV. STANDING

A. *Contentions*

Kodak contends that *Berkey* holds that the flipflash

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3. In recent cases the Second Circuit has ruled that "mere conjecture or speculation by the party resisting summary judgment does not provide a basis upon which to deny the motion," *Quarles v. GMC (Motors Holding Div.),* 758 F.2d 839, 840 (2d Cir. 1985); and that "the opposing party may not rest upon mere conclusory allegations or denials," *Schering Corp. v. Home Insurance Co.,* 712 F.2d 4, 9 (2d Cir. 1983).

conspiracy was an unreasonable restraint of competition only in the manufacturing of amateur still cameras. Since plaintiffs rely on *Berkey* to establish antitrust violation, Kodak contends that plaintiffs must allege an injury to their manufacturing of cameras, not some other injury which the *Berkey* court did not address. Kodak asserts that "plaintiffs abandon th[e *Berkey*] framework and adopt a wholly different one in advancing Interphoto's claim for lost sales as a 'full line' photographic distributor and Argus's derivative claim for lost trademark royalties on Interphoto's sale of a broad and undefined group of 'Argus' products."

Plaintiffs contend that they have standing since they "competed with Kodak in the production and distribution of pocket cameras" and "were within the area of the economy endangered by the breakdown of competitive conditions caused by the flipflash conspiracy." Plaintiffs further contend that it is immaterial whether Interphoto was a manufacturer "since the flipflash conspiracy gave Kodak an illegal competitive advantage in the sale of its pocket cameras over Interphoto and other distributors competing with Kodak for sales to retailers of pocket cameras."

B. *The Applicable Law*

Section 4 of the Clayton Act, 15 U.S.C. § 15, states, in pertinent part, that:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . ."

The Supreme Court has held that by this statutory language, "Congress did not intend the antitrust laws to provide a remedy

in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n. 14, 92 S.Ct. 885, 892 n. 14, 31 L.Ed.2d 184 (1972). "It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." *Associated General Contractors of Calif., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 536, 103 S.Ct. 897, 908, 74 L.Ed.2d 723 (1983).

The Supreme Court has likened the inquiry on standing to sue to the "proximate cause" analysis in torts. *See id.* at 535, 103 S.Ct. at 907; *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477-78 n. 13, 73 L.Ed.2d 149 (1982). Accordingly, it has "identif[ied] factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Associated General*, 459 U.S. at 537, 103 S.Ct. at 908. Factors precluding the right to sue under antitrust laws are the indirectness of the asserted injury, the speculative nature of the damage theory, the risk of duplicative recoveries and the danger of complex apportionment. *See id.* at 538-45, 103 S.Ct. at 909-12; *Triple M Roofing Corp. v. Tremco*, 753 F.2d 242 (2d Cir. 1985).

In *Associated General*, the plaintiffs, two Unions, alleged that an association of employers had illegally restrained trade by coercing third parties and some union members to enter into contracts with nonunion contractors. The Court held that the Unions lacked standing, in part because the Unions were "neither a participant in the market . . . nor a direct victim of the defendants' coercive practices." *Associated General*, 459 U.S. at 540 n. 44, 103 S.Ct. at 910 n. 44.

The Court noted that other potential plaintiffs, the

"immediate victims of coercion" were "an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement" and said that this "diminishe[d] the justification for allowing a more remote party such as the Union to perform the office of a private attorney general." *Id.* at 542, 103 S.Ct. at 911. If the Unions were allowed to recover, the courts "would face problems of identifying damages and apportioning them among directly victimized contractors and subcontractors and indirectly affected employees and union entities." *Id.* at 545, 103 S.Ct. at 912.

By contrast, in *Blue Shield* the Court granted standing based on a more direct link between injury and violation and the absence of countervailing considerations. In *Blue Shield*, the plaintiff was a subscriber to a group health plan that reimbursed members for services provided by psychiatrists but not for those provided by psychologists. Plaintiff, who had been treated by a psychologist, alleged that the bar against compensation to psychologists was a group boycott that violated the Sherman Act § 1.

The Court held that the subscriber had standing because there was a "physical and economic nexus between the alleged violation and the harm to the plaintiff," *Blue Shield,* 457 U.S. at 478, 102 S.Ct. at 2548, and because the harm to plaintiff "was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy." *Id.* at 479, 102 S.Ct. at 2548.

Prior to the Supreme Court's decisions in *Blue Shield* and *Associated General,* the Second Circuit used a "target area" test to determine whether an antitrust plaintiff had standing. Under that standards, a plaintiff could sue only if he could "allege a causative link to his injury which is 'direct' rather than 'incidental' or which indicates that his business or property was in the 'target

area' of the defendant's illegal act." *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 877, 27 L.Ed.2d 829 (1971) (franchisor lacks standing to sue for injury to franchisee).[4] *See also Vincel v. White Motor Corp.*, 521 F.2d 1113, 1119 (2d Cir. 1975) (stockholder lacks standing to sue for injury to corporation); *Calderone Enterprises v. United Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930, 92 S.Ct. 1776, 32 L.Ed.2d 132 (1972) (landlord lacks standing to sue for injury to tenant); *SCM Corp. v. Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943, 89 S.Ct. 2014, 23 L.Ed.2d 461 (1969) (patentee lacks standing to sue for his injuries to his licensees). These cases remain influential; after the two Supreme Court decisions, the Second Circuit stated that the target area cases have not been "drained of their precedential vitality on their own or very similar facts . . ." *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290, 293 (2d Cir. 1983) (Friendly, J.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984).

Under the law of standing, a camera manufacturer has standing to sue for the antitrust violation found in *Berkey* because camera manufacturers were the "direct" victims of the violation. The secrecy agreement restricted the disclosure of the flipflash project to camera manufacturers, thereby delaying the manufacturers from designing, tooling-up, and advertising for

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4. Under the target area standing rule, "even parties whose injuries may be both immediate and foreseeable may lack standing to pursue a private remedy if that injury is indirect or incidental, or if their business was not in the target area of the alleged illegal acts." *Long Island Lighting Co. v. Standard Oil Co.*, 521 F.2d 1269, 1274 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073, 96 S.Ct. 855, 47 L.Ed.2d 83 (1976).

a new product. Camera manufacturers were the "direct" victims of the violation.

Under § 4 of the Clayton Act, a distributor of a general line of photographic items is not a person injured in his business "by reason of" a conspiracy to restrain competition by keeping secret an innovation by a camera manufacturer and a flash lamp maker. Unlike a manufacturer, a distributor is remote from the violation, on a different level of the markets involved; a distributor is not a competitor of the manufacturer and not his rival. Although a distributor may suffer a loss of some kind, it is not " 'the type of loss that the claimed violations . . . would be likely to cause.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).

Injury to the distribution of a general line of photographic supplies was not a necessary step in attaining a manufacturing headstart from the illegal secrecy of the innovative flipflash. Admittedly, a camera producer is injured by the violation, and a distributor suffers too—but the latter's is not the same injury, but rather a distinct one. *Berkey* did not present the issue whether the secrecy agreement had an unreasonable impact on photographic distributors. In this case Interphoto is suing solely because of an injury to a level of the market that was not considered in *Berkey*. In short, a distributor is not in the restrained market as that was defined in *Berkey*.

Similarly, a trademark licensor is not within the area of the economy endangered by the breakdown of competitive conditions found in *Berkey*. Such a licensor merely sells the rights to its name for use on goods designed, produced, and sold by others. It is not at the level of the market directly affected by the agreement to keep the development of flipflash secret from other camera manufacturers.

Appendix B

To deny standing to a distributor or trademark licensor does not leave a substantial antitrust violation unremedied, since camera manufacturers do have standing. In fact, to permit a trademark licensor or distributor to have standing would increase the risks of duplicative recovery and complex apportionment, since the Court would have to determine how to apportion damages among the actors along a lengthy chain. To allow standing in these circumstances would be contrary to the teachings of *Blue Shield* and *Associated General.*

C. *Argus*

1. *Argus Was No Longer a Manufacturer*

Argus is a publicly held Delaware corporation incorporated in 1960. Its stock was listed on the American Stock Exchange until 1974, when it was delisted. At one time Argus was a manufacturer of photographic products, including cameras. At its peak, it had five manufacturing facilities for photographic supplies and equipment located in the United States and Canada. By 1964, its five photographic manufacturing facilities had been reduced to two, one in South Carolina, and one in Ontario. Sometime prior to 1970 Argus ceased manufacturing cameras at either one. There is no evidence that Argus was a camera manufacturer at any time relevant to this action.

From 1970 to March 1, 1975, at the latest, Argus functioned as an importer and distributor of cameras manufactured abroad. Argus imported and distributed cameras labelled with the "Argus" name which were manufactured by two Japanese firms, Cosina (35 mm still cameras; 8 mm movie cameras), and Sedic (110 cameras). The Sedic Agreement described Argus as a "distributor." Argus' business with both of these firms terminated in 1974.

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After March 1, 1975, Argus was not even a camera importer; it merely licensed its "Argus" trademark to Interphoto for use on cameras and other photographic equipment. Under the Argus—Interphoto licensing agreement, the latter purchased, imported, and resold cameras and had them labelled with the name "Argus." All sales of Argus labelled products were made through Interphoto. The agreement called for a royalty of 1½% on Interphoto's sales of "Argus" merchandise, but specified that no royalties were payable to Argus during the first year.

Argus' contemporaneous documents establish that it was no longer a manufacturer of cameras at the time of the flipflash announcement. There is no probative evidence to the contrary. Argus' Form 10-K for the year ending February 29, 1976, acknowledges: "Argus Incorporated ("Argus") is engaged primarily, through its 81.3% owned subsidiary, Interphoto Corporation ("Interphoto"), in importing and distributing cameras, projectors and other photographic equipment for the amateur market in the United States and Canada."[5] The only manufacturing that Argus reported was the "[l]imited manufacturing of photographic equipment, principally slide trays and viewers, . . . performed by the Company's General Tool and Die Division. Such products are sold to Interphoto for distribution."

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5. In the Argus Annual Report for the fiscal year ended February 28, 1976, its President, in a letter to stockholders dated July 21, 1976, stated:

> "Argus Incorporated has become principally a holding company . . . its direct operations are limited to the maintenance and collection of royalties from existing patents, the development of new patents, and the service and direct warranty repair of outstanding products in the U.S."

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Argus' research and development had dwindled to almost nothing by the time of the flipflash announcement. Argus' Form 10-K and its Annual Report, transmitted to shareholders on July 21, 1976, reported: "Argus spent approximately $115,000 during the year ended February 28, 1975 on the development of new products or services, or the improvement of existing products or services. There was no significant expenditures in 1976. It employs one employee on a full-time basis on product development."

The lack of research and development did not go unnoticed by senior Argus personnel. On June 25, 1975, E.R. Isaacson wrote Dan Porco, "As new products became fewer and fewer and as product purchases dropped off, the personnel involved were layed [sic] off indefinitely. . . Suddenly now, new products are being sought and samples have been delivered for evaluation. I have no trained manpower for this type of work other than to do it myself as best I can fit it into my schedule."

In September 1976, Argus' patent attorney admitted that "he believed all products sold by Argus for the past several years were not truly of Argus design or manufacture . . ."

2. *The Maurer Project Collapsed*

Argus' only conceivable claim to being a manufacturer of cameras after 1970 was through a venture with Maurer Commercial Products Corporation. In 1973, Argus decided to try to produce a pocket camera in this country which would solve the "red-eye" problem. It made an agreement with Maurer, dated August 22, 1973, under which the latter was to produce such a camera within eight months. No such camera was ever produced.

The Agreement provided for Maurer to produce magicube

cameras. It stated: "Maurer agrees to manufacture for Argus, and Argus agrees to purchase from Maurer" certain pocket cameras "according to designs, plans and specifications submitted by [Maurer] to Argus." The Agreement further provided that "Maurer is an independent contractor" and that neither party could bind the other, "the relation between MAURER and ARGUS hereunder being solely that of manufacturer and purchaser." An amendment dated December 4, 1973, "expand[ed] the scope of work to be performed by Maurer to include engineering, design and manufacture of a second generation pocket type camera identified as the Model 40."

The Agreement, as Maurer described it in a February 26, 1974 memorandum, was a "purchase order between Argus and Commercial." Although Argus did routine product evaluation, Maurer had design responsibility; on August 27, 1974, E.R. Isaacson wrote to Maurice Day that "the evaluation [of the first C-25 camera] work was completed on 8/16 and the sample camera has been returned to Maurer to determine the cause of failure."

The camera venture was repeatedly delayed and collapsed completely before the flipflash announcement. On April 19, 1974, near the time the Agreement called for mass production, Lewis wrote to Day that "Irving [Brand of Maurer] is talking June pilot and production starting August 1 on Model C25." Yet on July 17, 1974, Porco wrote Maurer complaining that the camera had thus far cost twice what had been anticipated and saying that "there is no hope of production until early next year."

The Maurer project also was plagued by funding problems: in an inter-office memorandum dated February 26, 1974, Maurer acknowledged that it had "been unable to obtain this loan [to purchase materials] from any bank or commercial lending

institution." Nine months later, on November 11, 1974, Royal Business Funds, a Maurer affiliate, wrote to the Small Business Administration that Argus "recently (two weeks ago) informed us of their inability to continue the [camera] project." In the same month, Maurer confessed judgment to Royal Business Funds in the amount of $652,643.58 because it had defaulted on a promissory note. One month later, in December 1974, the Sheriff levied on all the assets of Maurer in partial satisfaction of the judgment.

In contemporaneous documents, Argus admitted that financial difficulties contributed to the collapse of the Maurer project. On July 11, 1975, Argus General Counsel Richard Dorfman stated in a letter to Argus' auditors, Arthur Andersen & Company, that the Maurer venture "collapsed with the demise into bankruptcy of Mauer [sic]." Dorfman expressed the opinion that Argus was not liable to Maurer for the failure of the venture because "Argus's responsibilities to Mauer [sic] appear to have been contingent on Mauer [sic] obtaining financial backing, which it did not."

3. *Argus Does Not Have Standing*

Kodak has introduced numerous contemporaneous statements made by Argus showing that Argus had given up manufacturing cameras by the time of the flipflash announcement. Plaintiffs have not brought forward any probative evidence to the contrary, relying instead on the conclusory statements of their managements.

The documentary evidence shows that Argus had ceased manufacturing cameras in its plants, that its relationships with foreign producers had been terminated, that it had licensed Interphoto to sell "Argus" brand products, that its research and

development expenditures were *de minimis*, that the Maurer project had collapsed, and that Argus had not designed or produced any new cameras in several years. Argus confined its activities to licensing its trademark and approving the quality of cameras purchased by Interphoto and sold by it. These activities place Argus outside the area of the economy endangered by the flipflash secrecy agreement. Accordingly, Argus does not have standing to sue for the violation found in *Berkey*.

Argus' desire to manufacture a camera, through the aborted Maurer project, is not sufficient to transform it into a manufacturer. Argus has not shown the requisite actual preparedness to enter the market: i.e., the "ability to finance the business and purchase the necessary facilities; consummation of contracts towards the purchase of the business; affirmative action by the plaintiff to enter business; and the background and experience [necessary to enter the business]." *Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336, 338 (10th Cir.), *cert. denied*, 459 U.S. 1090, 103 S.Ct. 576, 74 L.Ed.2d 937 (1982) (although there was "some indication of cooperation" from various financing sources, plaintiff was unable to raise $150,000 of "front money"; standing denied). *See also Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633 (5th Cir.), *cert. denied*, 385 U.S. 991, 87 S.Ct. 600, 17 L.Ed.2d 451 (1966) (no standing; plaintiff "did not have the ability to finance the business, but was hoping to obtain 100% financing from the Bank"); *Reaemco, Inc. v. Allegheny Airlines*, 496 F.Supp. 546, 554-55 n. 4 (S.D.N.Y. 1980) ("plan to enter the express business and an unfinanced proposal to purchase [assets]" is not enough for standing); *Laurie Visual Etudes v. Chesebrough-Pond's, Inc.*, 473 F.Supp. 951, 956-57 (S.D.N.Y. 1979) ("preparedness to manufacture" not established by "unsupported assertion of financial capacity to undertake the financing of a venture into a new and untried field"; "blueprints

and handmade model" do not show capacity).

Moreover, even if Argus were a manufacturer, it would not have standing since, in this action, it asserts no claim for damages as a manufacturer, importer, or seller of cameras. Plaintiffs assert that "Argus is suing only for loss of royalties as a result of Interphoto's inability to sell Argus brand products." Such claimed injury to Argus is "remote" along an "attenuated" "chain of causation" from the injury suffered in the market by the agreement between Kodak and General Electric to withhold flipflash from camera manufacturers. Since Argus' asserted claim is so remote from the injury suffered in the market, it does not have standing.

D. *Interphoto*

1. *Interphoto was a Distributor*

Interphoto is a publicly owned Delaware corporation. It was listed on the American Stock Exchange until 1979, when it was delisted. Formed in 1961 as a national wholesale distributor of photographic, audio and related products, Interphoto branched into the resale of decorative electric lights, speakers and television sets. In 1970, Argus, which was then substantially owned by Michele Sindona, acquired 50.56% of the outstanding shares of Interphoto. In 1975-76, Sindona jettisoned his interest in Argus to members of the management of Interphoto and Argus.[6] Argus

6. On June 26, 1975, July 2, 1975 and January 13, 1976, 14 insiders acquired an aggregate of 7,020,776 shares of Argus common stock, representing approximately 64% of the outstanding shares, from Fasco A.G. (a personal holding company for Michele Sindona) for an aggregate purchase price of $400,000, of which $200,000 was payable in cash and the balances payable over a two-year period. As of June 11, 1976, there were approximately 5,757 holders (Cont'd)

increased its stock interest in Interphoto to 80% in 1976.

Prior to 1983 and the exigencies of this lawsuit, Interphoto never claimed to have been a camera manufacturer. Beginning with its first Annual Report in 1962 until its demise in 1980, Interphoto repeatedly described itself as a company "engaged in the importation, merchandising and wholesale distribution of a broad range of consumer photographic equipment and supplies." *See, e.g.*, Interphoto Corporation Form 10-K for Fiscal Year ended February 28, 1975; Interphoto Corporation Form 10-K for Fiscal Year ended February 29, 1976. These self-descriptions do not mention any manufacturing, fabrication, or production activities.

Interphoto's 1975 Annual Report, dated May 28, 1975, stated that "Interphoto's reason for existence is to furnish manufacturers of photographic equipment and supplies with a low cost, efficient, nationwide distribution channel for their products. Interphoto distributes forty domestic product lines and sells proprietary products made by several dozen Japanese manufacturers." As recently as September 23, 1983, in its answer to interrogatories, Interphoto described itself as "a full-line distributor of products to camera stores, camera departments of department stores and similar retail outlets . . ." Interphoto never reported that it manufactured cameras of any kind, much less amateur still cameras.

Interphoto did not own any manufacturing facilities or employ any engineering staff. In its 10-K Forms for the fiscal years ending February 1974, 1975, and 1976, Interphoto reported

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(Cont'd)
of record of the common stock of Argus. In the calendar years 1975 and 1976, the stock traded from a high of 50 cents per share to a low of approximately 6 cents per share.

that "Registrant is engaged only indirectly in the development of new product ideas and the improvement of existing products, and is dependent on suppliers for product development." In its Form 10-K filed in February 1976, Interphoto announced that it "has no material patents, licenses, franchises or concessions, except for the Argus License Agreement . . . Sales of Argus label products approximated $4,000,000 in fiscal 1976."

Interphoto sold cameras only under the brand names of other firms. Interphoto's Form 10-K for the fiscal year ending February 28, 1975 reported that "Registrant has approximately 50 suppliers in the photographic field. Its purchase contracts with suppliers (with most of which Registrant has done business for many years) are for the most part arrangements at will . . ."

Interphoto's distribution arrangements with three major suppliers ended during 1974 and 1975. Purchases of Yashica 35 mm cameras ended February 28, 1975; purchases of Sedic 110 cameras ended September, 1974; and purchases of Petri 35 mm cameras ended during 1975.

During 1975, Interphoto imported 110 cameras designed and manufactured by Haking and sold to Interphoto by purchase order, not long-term contract. In testimony taken in Hong Kong, the Governing Director of Haking explained the relationship and business transacted with Interphoto:

> "Those cameras sold to Interphoto were not designed by Argus or Interphoto, they were all designed by ourselves. The mechanism and construction of these cameras were all done by our company. The only thing they did to the camera was to provide us with their private label brand

name to be used on the cameras and also some minor exterior graphic layout suggestions regarding styling of the brand name, the colouring of the outside casings, instruction booklets or packaging. But they had nothing to do with the design of the cameras.

* * *

"They were designed by W. Haking Enterprises Ltd., formerly known as W. Haking Industries (Mechanics & Optics Ltd.)."

Questioned whether these cameras were designed to specifications provided by Argus or Interphoto, or any company affiliated with them, the Director responded:

"No, they never provided us with any specifications for manufacture. They bought cameras of our own design."

"The only thing they did was to provide us with the private brand name to be used on the cameras and slight changes of the graphic layout. They just bought what we offered."

In response to the question whether the cameras were sold exclusively to Argus or Interphoto, or any company affiliated with them, the answer was:

"No, there was no exclusive arrangement with them at all. But cameras with 'Argus' private brand name were sold exclusively to Interphoto. They never used 'Argus' as a company to buy, they only used 'Argus' as a brand name."

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The witness testified that the cameras sold by Haking for resale by Argus or Interphoto did not differ from those sold to other Haking customers except for the brand name.

2. *Interphoto and Argus Were Separate Enterprises*

Interphoto contends that having proved successful in the distribution of Argus products, plans were made in 1973 and 1974 for the establishment of a fully integrated manufacturing and distribution operation between Argus and Interphoto for 1975. They point to the service of key executives as officers of both corporations and a complete identity of the Boards of Directors. They assert that commencing in 1973, they jointly participated in a program for the design, development, manufacture, and distribution of a 110 magicube camera. They assert that this project was continued in 1974 and 1975 in conjunction with Maurer Commercial Products Corporation. They say that "although Argus and Interphoto did not have complete identity of shareholders and although each continued as an independent corporation, it was clear that the process of manufacture and distribution was a joint and integrated process." (Porco Affidavit of February 22, 1985).

This elusive claim does not confer standing on Interphoto to assert its claims for lost "expected" sales of photographic equipment. The argument rests on the mistaken premise that Argus was a manufacturer. But even if that premise were correct, Interphoto has adduced no evidence, other than the conclusory statements of its management, to show that it was a joint enterprise with Argus. To the contrary, the documentary evidence establishes that the businesses of the firms were distinct.

Although Argus owned 50.56% of Interphoto at the time

of the flipflash announcement, the companies took pains to separate their corporate identities and business functions. They maintained separate books, never consolidating the financial statements of the two firms, and presented separate Annual Reports to their stockholders.

The relations of the two companies were deliberately kept at arm's length. After Interphoto became the exclusive licensee of the "Argus" name, Argus President Maurice Day stressed the distinctiveness of the business of the two companies in a September 25, 1975 letter to Interphoto President Dan Porco:

> "To make this communication quite clear, I want to state that the approval of the sale of a product with the Argus name on it is the prerogative and responsibility of Argus, and any compromise is not debatable or is the authority delegated to anyone in Argus to make an exception."

Subsequently, in an interoffice memorandum dated March 25, 1976, Porco stated that "[a]ll of the dealings between Interphoto and Argus have been fully arm's length and the resulting schedule of royalties represents the results of long discussions and are based on many factors, both marketing and economic."

A September 29, 1975 letter to the SEC from Interphoto Vice President Jerold B. Friedman objected to a Commission suggestion that Argus and Interphoto consolidate their financial statements on an equity basis. Friedman stated:

> "Argus and Interphoto have always had separate working capital financing from differeant lending sources. Furthermore, due to the restrictive nature

> of Interphoto lending agreements, the working capital and other assets of Interphoto have never been available to Argus, despite severe working capital shortages and losses of Argus."

Friedman added that:

> "During five years of Argus' investment in Interphoto through June 1975, Argus has never been responsible for any of the debts of Interphoto through guarantees or other arrangements."

Friedman told the SEC that in July 1975, when Interphoto's principal lender, Walter E. Heller & Company, Inc., requested that Argus guarantee Interphoto's borrowing under an $8,000,000 line of credit, Argus had refused, guaranteeing only $500,000. After stating that "[t]his sole guarantee is not significant . . .," Friedman concluded:

> "We feel that it would be inappropriate to reflect the working capital, other assets, or the liabilities of Interphoto in consolidated financial statements of Argus, when Argus has no claim to such assets nor obligations with respect to such liabilities . . ."

There is absolutely no specific probative evidence that Argus and Interphoto were integrated companies.

3. *Interphoto Does Not Have Standing*

Interphoto claims that it was injured as a competitor of Kodak in the wholesale distribution of cameras and that the "flipflash conspiracy gave Kodak an illegal advantage in the sale of its pocket

cameras over Interphoto and other distributors competing with Kodak." However, Interphoto cannot rely on *Berkey* to show that this asserted injury arose from an unreasonable restraint of trade. The *Berkey* court simply was not confronted with the question of whether the flipflash conspiracy gave Kodak a competitive advantage in the *wholesale* distribution of pocket cameras.[7]

Because a distributor is remote from the *Berkey* violation, Interphoto does not have standing as a distributor of photographic equipment. Moreover, Interphoto's contemporaneous statements, which were introduced by Kodak, establish that Interphoto was only a distributor at the time of the flipflash announcement. Prior to this lawsuit, Interphoto never claimed to be a camera manufacturer. It has never owned or invested in facilities for manufacturing, designing, or fabricating cameras. Rather, it bought cameras for resale from numerous suppliers, frequently substituting among them. Plaintiffs have not brought forward any probative evidence that it was anything other than a distributor, relying instead on the conclusory statements of their management. Such statements, however, have not raised any genuine issue of material fact that contradicts or is at variance with the documentary proof.

V. CAUSATION

Apart from plaintiffs' lack of standing to complain, it is

7. Professor Areeda has described the *Berkey* ruling pertaining to flipflash as follows: "The Court affirmed a jury verdict finding an unreasonable restraint of trade in Kodak's agreements with General Electric and Sylvania providing for cooperation in developing camera flash equipment and restricting the freedom of General Electric and Sylvania to disclose developments to *rival camera makers*." (Emphasis supplied). Areeda, Antitrust Analysis, at 229 n. 79 (3d ed. 1981).

clear that the violation asserted was not the proximate cause of the injuries claimed.

A. *Contentions*

Interphoto has claimed damages for its actual business losses from 1975 through 1980 as well as for "lost" profits on "expected" sales of all products from 1975 through 1985. The company contends that the flipflash secrecy agreement caused "direct" damage to its sales of 126 and 110 cameras and "indirect" damage to its sales of other products, leading to its demise in 1980.

Plaintiffs give the following account of the chain of causation between the flipflash agreement and their alleged injuries. To begin with, Interphoto needed a "leading line" to serve as a door opener so that it could sell a broad range of photographic products. Sometime in 1974-75, the management of Argus and Interphoto decided that Interphoto's only leading line in 1975 would be Argus 110 magicube cameras. However, such cameras were rendered "obsolete" by flipflash. Although Interphoto moved quickly after the flipflash announcement and arranged to buy a flipflash compatible camera from Haking, the latter was unable to deliver the cameras in commercial quantities in time for the 1975 Christmas selling season. The argument continues that, since Interphoto did not have flipflash cameras, it lacked a leading line for the 1975 Christmas season and had no door opener during the period when it usually did a substantial portion of its business, causing its sales of other items necessarily to fall.

The plaintiffs allege that they lost credibility with their customers when Interphoto was unable to make the deliveries of flipflash cameras that they had promised to dealers in time for Christmas. The customers allegedly then turned to other

distributors. In a chain reaction thereafter, it is contended that Interphoto's sales declined, its credit was further restricted, its product availability was reduced, it suffered further sales losses in 1976 and later years, and ultimately, five years later in 1980, it went out of the wholesale photographic distribution business.

B. *Applicable Law*

In order to recover for antitrust injuries, a plaintiff in an antitrust case must establish a causal link between the alleged loss and the unlawful conduct. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571 n. 9, 23 L.Ed.2d 129 (1969). The causal connection must be sufficient to show that the violation was a "material cause" or "substantial factor" in causing plaintiff's injuries. *See id.; Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 711 (2d Cir. 1983).

Injuries that are only remotely connected to the illegal conduct are not legally cognizable or compensable. Any antitrust violation is likely to cause "ripples of harm," *Blue Shield*, 457 U.S. at 476-77, 102 S.Ct. at 2546-47; *see also Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 877, 27 L.Ed.2d 826 (1971) ("ripples of injury"), but the Clayton Act's protection does not extend to the outermost perimeters of impact: "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n. 14, 92 S.Ct. 885, 892 n. 14, 31 L.Ed.2d 184 (1972).

The doctrine of proximate cause applies in Clayton Act § 4 litigation, denying relief where the causal connection between the violation and injury is uncertain, remote, or speculative. *Associated*

General Contractors, 519 U.S. at 532-535, 103 S.Ct. at 905-907. Thus, the harm alleged must be "the type of loss that the claimed violations . . . would be likely to cause," *Brunswick Corp. v. Pueblo Bowl-O-Mat Corp.,* 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977), and no recovery may be had for an injury that is "too tenuous and conjectural for a valid causal finding." *Reading Industries, Inc. v. Kennecott Copper Corp.,*631 F.2d 10, 14 (2d Cir. 1980), *cert. denied,* 452 U.S. 916, 101 S.Ct. 3051, 69 L.Ed.2d 420 (1981).

C. *No Probative Evidence of Causation*

Whatever the hypothetical plausibility of plaintiffs' theory, there is no factual support—no specific probative evidence—for the alleged causal links between the agreement not to disclose the development of flipflash and the collapse, five years later, of Interphoto's distribution business. The links rest merely on conclusions of plaintiffs' witnesses, and no more.

No evidence supports Interphoto's contention that flipflash "obsoleted" the Argus 110 cameras using magicube or gave Kodak a competitive advantage. To the contrary, Interphoto actually purchased 50,000 flashcube cameras from Haking in the summer of 1975 to be delivered at the rate of 10,000 per month. Moreover, Interphoto's share of the amateur still camera market showed a slight increase in 1975, whereas Kodak's share of the market declined. During the period from 1974-76, Kodak's sales of 110 cameras declined from 4,168,000 in 1974, to 4,077,000 in 1975, to 3,238,000 in 1976. Its share of the amateur still market declined from 75% in 1974, to 70% in 1975, to 59% in 1976.

Similarly, there is no documentary or other probative evidence that customers shifted purchases from Interphoto to Kodak

because of flipflash. Plaintiffs concede that Vivitar and Keystone drew business from Interphoto in 1975, even though neither of those firms had a flipflash camera on the market. The biggest sales increase was made not by Kodak and flipflash, but by Vivitar and the built-in electronic flash (a feature which was not offered by Kodak or Interphoto in 1975). Although Vivitar had entered the market only in 1974, it had become the second largest seller of 110 cameras by 1975.

There is also no specific probative evidence that the unavailability of flipflash had an adverse impact on sales of other photographic products during the 1975 Christmas season or thereafter. Not a single document showed a link between sales of cameras and other items. No customer was identified who reduced purchases of photographic supplies because of his inability to purchase flipflash.

Moreover, there is no evidence to support plaintiffs' contention that Argus 110 cameras would have been a useful lead line for Interphoto's full line of photographic products. Indeed, as of March 1, 1975, there was no Argus 110 camera to substitute for the cameras in the cancelled arrangment to buy from Sedic. Sedic's last sales to Argus were in 1974, and Maurer's camera never came into production. In 1975, the only 110 cameras with the Argus label that were available to Interphoto between March 1 and the deliveries from Haking that started in October were those in inventory that had been bought from Sedic in 1974. The ability of the magicube cameras on hand to serve as a lead line item or door opener was speculative in 1975 and remained so.

To support their "lead line" theory, plaintiffs irrelevantly rely on cases involving the wrongful termination of a distribution arrangement, in which the courts found a causal connection

between the cut-off of one product and the distributor's subsequent loss of sales of other products. *See e.g., Spray-Rite Service Co. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), *aff'd*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984); *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942, 96 S.Ct. 1409, 47 L.Ed.2d 348 (1976); *Westman Comm'n Co. v. Hobart Corp.*, 461 F.Supp. 627 (D.Col. 1978); *Fuchs Sugar & Syrups, Inc. v. Amstar Corp.*, 447 F.Supp. 867 (S.D.N.Y. 1978), *rev'd on other grounds*, 602 F.2d 1025 (2d Cir.), *cert. denied*, 444 U.S. 917, 100 S.Ct. 232, 62 L.Ed.2d 172 (1979); *Interphoto Corp. v. Minolta Corp.*, 295 F.Supp. 711 (S.D.N.Y.), *aff'd*, 417 F.2d 621 (2d Cir. 1969). In these cases, suppliers illegally terminated a distributor's right to sell a well-known branded product (e.g., Maxwell House coffee in *Greene*). The distributors claimed that they had lost sales of other products ("follow on sales") because they no longer carried the well-known items. Because of the documented "door opener" effect of the terminated brand product, the facts established a proximate causal connection between the illegal conduct and the lost sales of other products.

These so-called "leading line" decisions are inapplicable to the claims that plaintiffs make here. Each of those cases involved nationally known products with proven ability to draw customers (who then might purchase other items). By contrast, the conclusory claim that Argus 110 cameras would have attracted follow-on sales in 1975 is entirely conjectural, unsupported by a track record or any other probative evidence such as a market survey. Each of the leading line cases involved the complete termination of the supplier—distributor relationship, whereas here, there was no rupture of Interphoto's relationship with Argus or any other supplier because of flipflash. In those cases, the terminated dealers faced competition from others who were selling the lost brand; here, no brand was lost. Finally, each of those cases arose out

of a long-term contractual relationship which, on the facts presented, made the loss of follow-on sales foreseeable. Here, Kodak had no such contractual involvement with Interphoto and the element of foreseeability is absent.

In sum, the conclusory testimony offered in support of the contrived lead line theory as an explanation for Interphoto's decline in 1975 and later years does not create—as a matter of law—a genuine issue of fact. No probative evidence indicates a causal nexus between the flipflash camera and lost sales of a wide range of photographic supplies. there is no proximate causal link between the harm alleged and the flipflash agreement.

D. *Substantial Evidence of Interphoto's Decline*

1. *Factors Other Than Flipflash*

A starkly different picture of Interphoto's disintegration emerges from the documentary evidence that *is* in the record. At the time of the flipflash announcement, the company was in dire financial shape. Interphoto acknowledges as much, but now contends that the financial crisis was over and it had divested itself of its unprofitable divisions.

However, the records show that Interphoto's entire operation was in trouble. Interphoto's net loss for the three years from March 1, 1972 to February 28, 1975 was $22,283,852, whereas its net income for the 12 years from 1961 to 1972 was only $11,126,392. Contrary to Interphoto's present assertion, even its photographic distribution business was unprofitable: its Form 10-K for the year ending February 1975, reports before-tax losses from photographic products as follows: in year ending February 1973, $685,000; in year ending February 1974, $1,846,000; and in year ending

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February 1975, $4,748,000.

In 1973, Interphoto began borrowing its working capital from Walter E. Heller & Company at 6% above the commercial paper rate (and subsequently 6% above prime). In return for the loans, Interphoto was required to pledge all of its assets as collateral. In July 1974, Heller asked Argus to guarantee a $8,000,000 line of credit for Interphoto; Argus refused, guaranteeing only $500,000.

Interphoto claims that it was losing money because of the overall depression in the photographic market, but that it remained strong in that market. However, Interphoto was losing not only money but also its *share* of the wholesale photographic market. The depressed market could account for a decline in profitability, but it could not explain Interphoto's decline in market share. Interphoto's evaporating market share for the relevant period was:

1965	1.84%
1966	1.46%
1967	1.49%
1968	1.32%
1969	1.15%
1970	0.87%
1971	0.92%
1972	0.88%
1973	0.88%
1974	0.58%

Interphoto's photographic workforce was shrinking during this time. Its sales force declined from 125 to 60 employees from mid-1974 to mid-1975. Interphoto's total workforce in its domestic operations declined from 425 on July 1, 1974 to 264 on February

1, 1975; on March 1, 1975, Interphoto introduced a plan to further reduce its personnel to 240. Near the end of 1974, Interphoto closed three of its seven warehouses.

Interphoto lost one-half of its sources of supplies between 1974 and 1975. In particular, effective February 28, 1975, Interphoto lost Yashica products, which had accounted for $11 million—or 30%—of Interphoto's entire wholesale photographic sales for the prior year. Interphoto's relationship with Cosina terminated in 1974 and with Petri in 1975, and it no longer had Sedic as a source of supply of 110 cameras after 1974. By approximately March 1, 1975, Interphoto no longer had any suppliers of 110 cameras, and had no manufacturing facilities or other sources from which to obtain them.

Interphoto claims that it was going to make up for those terminations and losses of products with the "expected" Maurer 110 camera and imported cameras under the brand names Argus, Accura, and Sunset. But during 1974, Interphoto sales of Argus brand *products* had dwindled to only $4.1 million, and Argus brand *cameras* totalled only $445,000. The Maurer camera never became available in 1974 as hoped for, and concededly, was not available even in April 1975. Due to Interphoto's precarious financial circumstances, its suppliers required letters of credit to secure payment for future deliveries, but those letters of credit were not forthcoming until August 1975.

2. *Contemporaneous Explanations*

Plaintiffs' current stance that flipflash automatically and immediately "obsoleted" magicube in 1975 is of recent origin and contradicts its previous position in this case, asserted when there was a question about the bar of this suit by the statute of

limitations. In their May 7, 1981 Answers to Interrogatories, plaintiffs' position was that a new product does not obsolete an old one until the new one gains "significant market acceptance," usually about a year after its introduction:

> "Injury as to each aforesaid anticompetitive act or practice respecting the marketing of new or modified products by defendants commenced on or about the date that each such product obtained significant market acceptance with the effect of obsoleting competing products, which generally occurred at least one year following the commencement of widespread marketing to the consuming public."

Only in its Annual Report of the year ending February 28, 1975, dated May 28, 1975, did Interphoto ever allude to a new Kodak camera. In this Report, issued six weeks after the flipflash, Porco wrote, "Kodak has again introduced a new Pocket Camera that obsoletes existing Pocket Cameras and our inventory and suppliers of 110 Pocket Cameras are in jeopardy." The Annual Report does not suggest that Kodak's "new camera" would or did have any impact on sales for any other Interphoto product. Interphoto's Annual Report for the year ending February 28, 1976, issued a year after the flipflash camera was introduced, does not even mention flipflash or any impact on Interphoto's sales performance. rather it attributes Interphoto's poor 1975 performance to the other factors with which it was struggling.

Interphoto now claims that it was emerging from its financial morass in 1975, that having divested itself of its unprofitable subsidiaries, it would have succeeded but for the absence of flipflash from its product offerings for the 1975 Christmas selling

season. However, contemporaneous documents authored by Interphoto officials conclusively contradict that litigation stance. As early as January 1973, before Interphoto began experiencing its large losses, James Coombes, Interphoto's Executive Vice-President, wrote, "nothing short of several years of steady, impressive progress on the income statement will mend our fences." In its Form 10-K and its Annual Report for the year ending February 28, 1979, Interphoto asserted:

> "Interphoto Corporation (the "Registrant") was engaged, prior to May 1975, in various businesses including photographic equipment (wholesale distribution and retail mail order), consumer electronic (home entertainment products) and decorative lighting products. After incurring substantial operating losses in the non-photographic operations, such businesses were divested. However, largely as a result of the impact of such businesses on the financial condition of the Registrant, its operations have continued to be unprofitable.". . .

Interphoto's contemporaneous documents also show that it attributed its inability to meet its 1975 sales forecast to factors other than flipflash. On November 11, 1975, in the midst of the important Christmas selling season, Porco informed Interphoto's Board of Directors, "Our sales were not up to forecast. The only valid excuse we have is that we were not able to get our fall goods on time. L.C.s [letters of credit] were not available until late in August." Similarly, on December 12, 1975, Porco wrote:

> "Our Christmas season will be the best ever for most of our domestic lines and the worst ever for

> imported products. . . .Our problems on the imported lines included the final discontinuation of the Petri cameras after many months of difficulties. We have a new and exciting number of products under Argus, Formula 5, and Accura labels. But, because of late order by us, slow L.C.'s and late shipments, approximately $4 million worth of products did not arrive here in time for the Christmas season."

Porco did not so much as allude to the flipflash camera or its impact on Interphoto's "continue[d] discouraging" performance.

In its Form 10-K for the year ending February 29, 1976, Interphoto again attributed its dismal 1975 sales performance to factors other than flipflash:

> "During its past two fiscal years ended February 29, 1976, Registrant experienced substantial declines in sales attributable primarily to the general depression in the consumer photographic industry, late deliveries of imported products from the Far East and particularly the termination, effective February 28, 1975, of its long-standing agreement for exclusive distribution of Yashica products. Sales of Yashica products accounted for approximately 26% of Registrant's sales in fiscal 1975."

Even in its Form 10-K for the year ending February 28, 1977, with the benefit of a year's hindsight, Interphoto still attributed its problems for the year before to factors other than flipflash:

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> "Sales in fiscal 1976 declined approximately $18 million from year earlier levels. This substantial decline was attributable to various factors, primarily the discontinuance effective February 28, 1975 of the distribution of Yashica cameras, which had accounted for approximately $11 million of 1975 sales. Late delivery of products imported from the Far East and the general depression in retail photographic sales accounted for the additional loss in sales volume."

None of Interphoto's contemporaneous official documents laments the loss of customers because of Interphoto's inability to sell 10,000 additional flipflash cameras which it allegedly promised the customers for Christmas 1975. In fact, Interphoto conducted a survey of its customers in 1976 and none of them complained about Interphotos' inability to deliver flipflash.

In its published 1979 Annual Report, Interphoto reported, "A material part of the business of Registrant and its subsidiaries is not dependent upon a single customer, or a very few customers; therefore, the loss of any one customer would not have a materially adverse effect on the Registrant."

The first time that Interphoto even remotely alludes to the flipflash as the cause for its financial decline is four years later, in its 1979 Annual Report, where Porco wrote, "Ever since the Bell & Howell and Fotomat settlements with Kodak were completed and the Berkey and GAF suits were filed, we have been searching for the means of entering the antitrust fray. We believe that our case is better than the two settlers and the two litigators."

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VI. DAMAGES

Apart from plaintiffs' lack of standing to sue and the absence of a proximate causal link between the violation and the injury alleged, it is clear that plaintiffs have not formulated cognizable damage claims or presented probative evidence for the claims that they have presented. This conclusion rests not on the credibility of plaintiffs' witnesses, but rather on the complete absence of any specific probative evidence to support their conclusory averments.

A. *Contentions*

Interphoto claims damages of lost sales for its entire wholesale photographic distribution business from 1975-1985. Argus claims lost royalties that it would have earned from Interphoto's expected sales of all Argus brand products from 1975-1985. To calculate their damages, both plaintiffs rely on the projections in Interphoto's 1975 business plan and ten year forecast.

Kodak's principal contention is that plaintiffs' damage theories rest on speculative and irrational assumptions. They maintain the plaintiffs irrationally claim damages for their entire business and all product lines, without showing the linkage between the sales of 110 cameras and other photographic products. Kodak also objects to plaintiffs' alleged failure to articulate or provide objective justification for the assumptions underlying the Interphoto business plan and forecast.

B. *Applicable Law*

No recovery can be had under § 4 of the Clayton Act "unless it is shown that, as a result of defendants' acts, damages in some

amount susceptible of expression in figures resulted." *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 909 (2d Cir.). *cert. denied*, 369 U.S. 865, 82 S.Ct. 1031, 8 L.Ed.2d 85 (1962), *quoting Keogh v. Chicago N.W. Ry. Co.*, 260 U.S. 156, 165, 43 S.Ct. 47, 50, 67 L.Ed. 183 (1922). The rule is that

> "While the amount of damages is measured by a less exacting standard than proof of violation and injury, the trier-of-fact must be furnished with evidence sufficient for a determination that the loss is not speculative, for not all antitrust violations cause loss and not all losses are measurable."

Jot-Em-Down Store (JEDS) Inc. v. Cotter & Co., 651 F.2d 245, 246 (5th Cir. 1981). A jury "may not render a verdict based on speculation or guesswork." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946).

It is the obligation of a Court to exclude, *in limine*, exhibits and damage theories which are based on speculation and guesswork, and are not "sufficiently probative." *Shannon v. Crowley*, 538 F.Supp. 476, 483-84 (N.D. Cal. 1981). *See also Pacific Mailing Equipment Corp. v. Pitney Bowes, Inc.*, 499 F.Supp. 108, 118-19 (N.D. Cal. 1980) ("pro forma profit and loss statements, entirely unannotated and totally failing to reflect their source or the underlying computations" are excluded; "opinion lacking any factual support should [not] be permitted to go to the jury to form the keystone of plaintiff's damage computation"). Professor Areeda has aptly stated:

> "Because satisfactory proof of damages is itself an essential element of the treble damage suit, the court can and should terminate the suit

> whenever it appears that damages are unlikely to be proved or capable of proof with reasonable judicial economy or, if proved, would not flow from the doctrinal reasons for finding that the defendant's conduct violates the anti-trust laws."

Areeda, *Antitrust Analysis* at 81 (3d ed. 1981).

C. *Interphoto's Damages Are Speculative*

1. *The 1975 Business Plan*

Plaintiffs contend that Interphoto's business plan for 1975 is probative evidence of what Interphoto would have earned in the next ten years but for the flipflash conspiracy and loss of sales during Christmas 1975. Interphoto management prepared a business plan every year for the upcoming fiscal year, delineating projected expenses and revenues by item. The plan they allegedly prepared in late 1974 and early 1975 for the year ending February 29, 1976 projected $30.1 million of Interphoto sales of photographic products to retailers; yet, Interphoto's actual sales to retailers were only $17.5 million.

Not even Interphoto placed any credence in its projections. In prior proceedings, Interphoto itself asserted that the plan was speculative, although it now expresses a different view. In an October 12, 1981 affidavit in response to Kodak's motion for summary judgment based on the expiration of the statute of limitations, Interphoto President Porco claimed that the plan was speculative. Under oath, Porco stated that the plan could not have been used to calculate Interphoto's 1975 damages because:

> "although plaintiffs needed to make some kind

> of guess as to what its possible production and purchases of equipment should be each year and, therefore, developed documents called "*projections*", in reality, the accuracy of these documents was *never relied upon* and a comparison between projections and actual sales even on an extremely short-term basis showed vast differences. During the relevant period, there were times when our *projections exceeded actual sales* by a *magnitude of 2 or 3 times*." (Emphasis supplied.)

Similarly, Argus' former Vice-President of Marketing, Jerome Littman, swore in an affidvit dated October 7, 1981:

> "This volatility is established by viewing the projections which plaintiffs made through the years and viewing those projections in comparison to actual sales. . . .*[P]rojections can be off 200 or 300 per cent* despite the most diligent efforts to make these projections as accurate as possible . . ." (Emphasis supplied.)

The plan did not take into account the various factors, unrelated to flipflash, which caused Interphoto financial difficulties: for example, the loss of important suppliers. In the year ending February 1975, over 3% of Interphoto sales were of Yashica cameras ($11 million worth of sales). However, the Yashica connection ended effective February 1975 and Interphoto did not have an existing new line to introduce. The plan assumed that Interphoto's remaining lines would grow at 23%, yet plaintiffs failed to put forward any explanation for this high rate of growth.

Similarly, Interphoto's plan projected $3 million worth of

sales of Petri 35 mm cameras even though Interphoto's relationship with Petri was discontinued in 1975. Interphoto's actual sales of the Petri camera inventory were only $1 million. The plan did not reflect the loss of Petri; plaintiffs did not explain how they intended to make up for lost sales of Petri product.

Interphoto's plan projected Kako strobe sales of $1 million; Kako also discontinued its relationship with Interphoto in 1975 and substituted Yashica as its exclusive distributor. Interphoto sold only $200,000 worth of Kako goods in the year ending February 1976.

The business plan also was flawed because it did not take into account that GAF, the manufacturer of the Sawyer projecter, revised its distribution agreement with Interphoto on March 18, 1975, two weeks after the beginning of the new fiscal year. The new distribution agreement permitted GAF to appoint several new distributors for its Sawyer products. In 1974, Interphoto sold $3.1 million of Sawyer products; the 1975 plan projected that Interphoto would sell $6.6 million of Sawyer products, or 22% of Interphoto's total sales to retailers. Interphoto's actual sales of Sawyer products were only $1.8 million.

Interphoto's contemporaneous documents attributed the lost Sawyer sales to GAF and not to flipflash. On August 2, 1976, Kenneth Lacy told Interphoto's Board of Directors, "Four years ago Interphoto sold $6 million worth of Sawyer products—last year we sold only $1.5 million. We feel this is a direct result of GAF's inattentiveness to the Sawyer products. We feel that we can project sales of this product at between $2.3 to $2.8 million."

The plan was not revised to account for crucial changes that occurred in 1975. For example, prior to 1975, Argus, not

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Interphoto, sold to catalogue, stamp, and premium equipment houses ("Argus Special Markets"). In the year ending February 1975, Argus sold $1.5 million to those markets. Yet the plan projected Interphoto sales of $2.4 million, apparently without taking into consideration that Interphoto, not Argus, would now be selling to these markets. Moreover, Argus' Vice-President of the Special Markets Division, Robert Lewis, resigned effective May 9, 1975. Interphoto did not explain how it intended to make up the "personnel" gap and add $0.9 million worth of sales at the same time.

Moreover, the plan did not anticipate the delays associated with the imported products. The plan projected $9.7 million worth of sales of imported products; actual sales were $5.4 million. On December 12, 1975, Porco wrote that "because of late order by us, slow L.C.'s and late shipments, approximately $4 million worth of [imported] products did not arrive here in time for the Christmas season."

Plaintiffs contend that the plan is reliable since the first quarter projections nearly equalled actual sales: predicted sales were $5,131,450 and actual sales were $5,373,000. However, the asserted correlation does not establish the reliability of the plan because the first quarter projection is too low. Historically, Interphoto sold 21.2% of its dollar volume in the first quarter, but the plan predicted sales of only 17%. In other words, the plan predicted that Interphoto would sell *below* the historical seasonal average in the first quarter. Since the first quarter prediction was lower than the seasonal average, the plan also predicted Interphoto sales *above* the seasonal average for the remaining three quarters. Plaintiffs never explained how they intended to sell above the seasonal average later in the year, especially after the Yashica inventory ran down, the Petri and

Kako lines were terminated, and GAF added distributors.

Because the plan was based on speculative and unfounded assumptions, it is not probative of Interphoto's losses and is not admissible evidence of damages. As Judge Friendly pointed out, exhibits should be excluded when they create "a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it." *Herman Schwabe, supra,* 297 F.2d at 912.

2. *The 1975-1984 Forecast; Expert Testimony*

Plaintiffs also rely on a 10 year forecast, prepared for trial by Interphoto management, of Interphoto's alleged lost sales for fiscal 1975 through 1984. The forecast projected Interphoto sales of photographic products of $824.7 million and Interphoto sales of Argus brand products of $352 million. Plaintiffs called Dr. Kenneth Warwick to testify that the forecast was a "fair and reasonable amount." Kodak contends that both the forecast and Dr. Warwick's testimony are inadmissible as evidence.

In ruling on the admissibility of the proposed expert testimony, the Court

> "possess[es] not only the power under Fed.R.Evid. 403 to determine whether it had a propensity for misleading or confusing the jury, but also the discretionary right under Fed.R.Evid. 703 to determine whether the expert acted reasonably in making assumptions of fact upon which he would base his testimony."

Shatkin v. McDonnell Douglas Corp., 727 F.2d 202, 208 (2d Cir.

1984) (citations omitted). As is the case with other proposed evidence, *in limine* consideration of expert testimony is appropriate. *Id.*

Dr. Warwick based his opinion on the conclusory statements of management, and not on his independent evaluation of the facts. For example, Dr. Warwick relied on management's assertions that Interphoto used a lead line, that Argus 110s were to replace Yashica, that Argus had strong brand name recognition, that flipflash was superior to magicube and that Vivitar's built-in strobe did not cause Interphoto's decline.

Dr. Warwick admitted that he did not conduct any surveys of the strength of Argus' brand name, did not examine or review Interphoto's customer orders or commission runs, and did not identify a single customer Interphoto lost because of flipflash. He also admitted that his studies of the market shares "went up to just before the introduction of Flipflash. . . I stopped I think at '74." Moreover, although Dr. Warwick expressed the belief that the "total sales in 1974 [of Argus brand cameras] were . . . of the order of 100,000 units," the parties have stipulated that Interphoto sales of Argus brand cameras in 1974 were only 11,693.

The speculative and conclusory testimony of Dr. Warwick is of little worth to a jury and his conclusions must be excluded to avoid confusion. Expert opinion, "unsupported by facts, that but for the defendants' conduct plaintiff would not have suffered losses does not convert the evidence of operating losses into evidence of damage flowing from defendants' antitrust violation." *Murphy Tugboat v. Shipowners & Merchants Towboat,* 467 F.Supp. 841, 864 (N.D. Cal. 1979), *aff'd,* 658 F.2d 1256 (9th Cir. 1981), *cert. denied,* 455 U.S. 1018, 102 S.Ct. 1713, 72 L.Ed.2d 135 (1982). Dr. Warwick's testimony and the 10 year forecast

are unsupported by reasonable assumptions and would be excluded at trial.

D. *Excludable Damage Claims*

If plaintiffs were to proceed to trial, they would not be permitted to recover damages for losses outside the amatur still camera market and beyond the time when flipflash cameras became widely available, in February 1976, when competition was no longer restrained.[8] Plaintiffs can recover damages only for the type of injury that the "antitrust statute was intended to forestall." *Associated General,* 459 U.S. at 540, 103 S.Ct. at 910. *Berkey* provides absolutely no support for the proposition that the antitrust laws were intended to compensate a distributor for lost sales of a wide variety of miscellaneous photographic products or a trademark licensor for lost royalties on the distributor's lost sales simply because a camera manufacturer and flash manufacturer agreed to withhold information from manufacturers about a new flash device.

Moreover, only damages which are the "certain result of the wrong" can be recovered. *Story Parchment,* 282 U.S. at 562, 51 S.Ct. at 250. The collapse of Interphoto's entire photographic distribution business and Argus' lost royalties are far removed from Kodak's refusal to disclose a flash device for one camera.

VII. CONCLUSIONS

1. Neither plaintiff is a person injured in his business or

8. During oral argument in *Berkey,* Judge William H. Mulligan stated that "The question [on damages] would be . . . how long would it take a reasonably able camera manufacturer to get into the market. That would presumably place some limitation on the time period over which damages could be recovered." (Tr. at 99)

property by reason of anything forbidden under the antitrust laws within the meaning of Section 4 of the Clayton Act.

2. Neither plaintiff has asserted a claim based on the direct impact of the flipflash secrecy agreement on the manufacture of amateur conventional still cameras. Plaintiffs' claims rest exclusively on *Berkey Photo, Inc. v. Eastman Kodak Co.*, and the secrecy of the development of the flipflash and a compatible camera. That authority does not sustain the claims.

3. Neither plaintiff was engaged in the business directly affected by the flipflash secrecy agreen ent: amateur conventional still camera manufacturing.

4. The injury and damages claimed by each plaintiff are indirect, remote and speculative.

5. By reason of Conclusions 1, 2, 3 and 4, plaintiffs lack standing to sue. *Associated General Contractors v. California State Council*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983); *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290 (2d Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984); *Southaven Land Co.v. Malone & Hyde, Inc.* 715 F.2d 1079 (6th Cir. 1983).

6. Neither plaintiff has asserted a claim for injury and damages proximately caused by the flipflash secrecy agreement. *Associated General Contractors, supra; Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977); *Story Parchment Co. v. Patterson Parchment Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Reading Industries, Inc. v. Kennecott Copper Corp.*, 631 F.2d 10 (2d Cir. 1980), *cert. denied*, 452 U.S. 916, 101 S.Ct. 3051, 69 L.Ed.2d 420 (1981).

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7. Plaintiffs have failed to adduce sufficient probative evidence of causation-in-fact to warrant submission of their claims to a trier of fact. *Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703 (2d Cir. 1983); *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575 (5th Cir.), *cert. denied*, 459 U.S. 908, 103 S.Ct. 212, 74 L.Ed.2d 169 (1982).

8. Plaintiffs' damage theories are not just and reasonable estimates and do not meet the minimum standard of rationality required for submission to a jury. *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946); *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865, 82 S.Ct. 1031, 8 L.Ed.2d 85 (1962).

The defendant's motion for summary judgment is, accordingly, in all respects, granted, and the action is dismissed on the merits, with costs.

The foregoing, together with further pertinent details set forth in the defendant's Proposed Findings of Fact, filed May 22, 1985, which the Court has stamped "Found" (as amended), shall constitute the Court's Findings of Fact and Conclusions of Law pursuant to Rule 52(a).

Plaintiffs have devoted an enormous amount of effort, time, and paper work to obscuring the dispositive legal posture of this case, namely, the incontrovertible position of the plaintiffs as outsiders of the relevant market, viz., the "manufacture" of 110 and 126 pocket cameras. That was the only market involved in the *Berkey* collateral estoppel, and the only market in which competition was legally affected by the flipflash secrecy agreement. The impact of that violative agreement for antitrust purposes was

plainly placed on the level of commerce relating to competition among camera manufacturers. There was no colorable basis for plaintiffs to assert otherwise.

The growing cost, complexity, and burdensomeness of civil litigation have become a serious concern to the public as well as to judges and lawyers. Misuse and abuse of the litigation process have become hallmarks of unreasonable and vexatious actions. *See* Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look,* 104 F.R.D. 181 (1985); *Eastway Construction Corp. v. City of New York,* 762 F.2d 243, 253-254 (2d Cir. 1985).

An application has been made by the defendant for an award of an appropriate sanction under Rule 11, Fed.R.Civ.P., which, if granted, will be entered at the foot of the judgment of the dismissal as additional costs.

To be considered in that connection are: the assertion in the complaint of multiple charges of violations and injury, most of which were withdrawn after extensive discovery involving inordinate expenditure of time, effort, and expense by the defendant; the assertion of claims that were contradicted by plaintiffs' own internal documents and records, by required filings with the Securities and Exchange Commission and the American Stock Exchange, and by reports issued to stockholders; the escalation of the damage claims for 1975 from $78,000 (asserted in 1981) to more than $2,800,000 (asserted in 1984); the oral testimony in open court on a highly material matter that was later recanted and was contradicted by documentary evidence in plaintiffs' possession; the tendency of the foregoing to frustrate and impede the fair consideration of the issues during the pre-trial phase and again on the motion for summary judgment; and other pertinent items that may be called to the Court's attention.

Appendix B

Such matters will be considered on papers to be presented by the defendant within two weeks of this date, and responded to by the plaintiffs within 10 days thereafter. A hearing will be held if requested by any party or if required by the Court following the submission of the papers.

APPENDIX C—RELEVANT STATUTORY PROVISIONS

Constitution

AMENDMENT VII—CIVIL TRIALS

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Statutes

15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . ."

15 U.S.C. § 15

§ 15. Suits by persons injured. . .

"[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount

in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . ."

Federal Rules of Civil Procedure

Rule 56. **Summary Judgment**

". . . (c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what

material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. . ."

Appendix C

Rule 43(e)

"Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition."

No. 86-949

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ARGUS INCORPORATED and
INTERPHOTO CORPORATION,

Petitioners,

v.

EASTMAN KODAK COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KODAK'S BRIEF IN OPPOSITION

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January 8, 1987

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Statement Pursuant to Rule 28.1

The subsidiaries and affiliates of Eastman Kodak Company, other than wholly owned subsidiaries, are listed below:

City Photo Limited

Consumer Developments Limited

Miller Bros. Hall & Company Limited

Ordinant S.A.R.L.

Photofinishers (Glasgow) Limited

Reflex Photo Works Limited

Sayett Canada Inc.

Softstrip International Limited

Stuart Photo Services Limited

Taylors Dev. & Printing Works Limited

The Roll Film Company Limited

Verbatim Commercial Ltd.

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KODAK'S BRIEF IN OPPOSITION

Statement of the Case

Petitioners ("Argus" and "Interphoto") filed this action two months after the Second Circuit's decision in *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (1979), *cert. denied*, 444 U.S. 1093 (1980), and initially asserted a litany of "antitrust" claims against respondent ("Kodak") relating to Kodak's introduction of numerous new products over the preceding 15 years, including many claims rejected in *Berkey* as a matter of law (*see* A71; P13-58).[1]

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[1] The appendices to the Petition are cited "A"; "P," "S" and "E" citations are to the joint appendix in the court of appeals.

After the district court held (552 F. Supp. 589) under the doctrine of collateral estoppel that Kodak was bound in this case by the *Berkey* determination that an agreement between Kodak and General Electric for joint development of the "flipflash" flash device and "110" amateur cameras to use it had unreasonably restrained trade among amateur camera manufacturers in 1975 (*see* 603 F.2d at 269 n.2, 300-304), petitioners stipulated to dismissal of all claims other than one based on that agreement (P321-32), even though neither of them was a camera manufacturer in 1975: Argus was a trademark licensor (A3; A34-40) and Interphoto a "full line" distributor of hundreds of photographic products made by others (A3; A40-44), with 110 cameras accounting for less than 5% of its sales (S1628).

Following the collateral estoppel determination, petitioners also contended for the first time that the "flipflash" agreement had caused their commercial demise (A12), through a "chain reaction" of eight or so stages (A6-7; A24-25; A48-49), leading to actual damages of some $57 million (A24), a remarkable escalation of their prior claim only for lost sales of 110 cameras (*see* A71). Although notified by Kodak that it intended to move against this claim as legally deficient (E3601-02), when required to state definitively their claims for trial, petitioners adhered to this single claim, declining to advance any other claim of injury and damages in the alternative (A7). Petitioners also expressly rested their claim of illegality solely on the *Berkey* determination and renounced any other theory of violation (A23; S1605).

Following the filing of the final pretrial order, Kodak moved for summary judgment on several alternative grounds (A20-21). Petitioners opposed the motion with an avalanche of papers (*see* A21), and the district court (Judge

Milton Pollack) directed a hearing pursuant to Rule 43(e) "to pierce the clouds of legal dust and get at the facts" (S691; *see* A26).

In a lengthy opinion considering all the "evidence" proferred by petitioners on paper and at the hearing, the district court granted summary judgment on four independently sufficient grounds (A68-70): (1) petitioners could not rely on *Berkey* and lacked standing (A28-47); (2) petitioners' claimed injury and damages were not proximately caused by the flipflash agreement (A47-59); (3) petitioners failed to adduce sufficient probative evidence of causation-in-fact to create a triable issue (A47-59), and (4) petitioners' damage theory was not legally admissible (A60-68). The district court also (A70-72) directed further proceedings to consider the award of an appropriate sanction under Rule 11 for petitioners' extended litigation of claims the court held were "contrived" (A53), lacked a "colorable basis" (A71) and would not have been asserted "by a reasonable businessman acting in good faith" (S1653).

The court of appeals (Judges Feinberg, Friendly and Winter) affirmed on the ground there was no triable issue as to causation-in-fact (A10), and did not reach the alternate grounds of lack of standing, absence of proximate cause as a matter of law, and inadmissibility of petitioners' damages theory. The court likewise did not address the question of Rule 11 sanctions as it was not yet the subject of a judgment (A19).[2]

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[2] The *Berkey* determination given collateral estoppel effect has been questioned by two members of this Court, *see* 444 U.S. 1093, and is in our judgment clearly erroneous. Kodak did not challenge the district court's collateral estoppel ruling on appeal (*see* A5) because that ruling was not the basis for any relief against Kodak and its reversal would not have been an adequate alternative ground for affirmance of the judgment in Kodak's favor.

Summary of Argument

This case does not present the questions posed by petitioners or any question warranting review by this Court. The decisions below did no more than apply settled law to undisputed facts to dismiss a case that was absurd in conception and abusive of the judicial process.

Argument

This case presents no question of general application. Rather, the decisions below were but a tempered and proper judicial disposition of this particular and peculiar case—a case in which petitioners sought to turn federal litigation into a new "line of business" in which "research and development" consisted of concocting fairy tales, "production" involved spinning those fairy tales out to a court, and the "return on investment" was projected to dwarf the fondest dreams of honest entrepreneurs.

A. The decisions below bear the indicia of careful and impartial deliberation which are the hallmarks of the judicial process. They follow settled law (A8-9; A25-28), and contain nothing which is bizarre or dubious. The grant of summary judgment alone certainly does not warrant a second appellate review in this Court. Summary judgment is "not a disfavored procedural shortcut," *Celotex Corp.* v. *Catrett*, 106 S. Ct. 2548, 2555 (1986), and does not abridge the right to trial by jury, *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, 319-21 (1902). One searches the court of appeals' opinion in vain for any indication that it "expressly adopted new standards which make it materially easier for a party seeking summary judgment to prevail" (Petition at 9) or for any suggestion that the court has determined to deny trials to litigants whose cases warrant trials so as "to economize on litigation resources" (Petition

at 7, 9).[3] The whole of petitioners' discourse (Petition at 6-13) on the evils of relaxed summary judgment standards simply has nothing to do with this case, and neither do the specific questions petitioners pose:

1. The court of appeals did not dismiss petitioners' claim because they "had not proven the full magnitude of damages which they claimed." (Petition i, Question 1; 14-16). The court of appeals nowhere discusses proof of an *amount* of damages; rather, it expressly found a failure "to present a triable issue of fact on the element of causation of the particular damages claimed," *i.e.*, damages for "lost profits on sales of Interphoto's and Argus' entire line of products, resulting in their commercial demise" (A5, A8; emphasis added). Petitioners deliberately renounced any claim limited to the sale of 110 cameras (Petition 14 n.15) and elected to proceed solely on the claim of injury to their entire businesses. Rejection of that claim in toto for lack of proof of causation has nothing to do with the "scope of damages" (Petition 14-15 n.16). Moreover, as the court of appeals held, the nature of petitioners' claim was such that no award could have been made "for any lesser claim" (A8).

2. The court of appeals' decision was not based on a misreading of *Matsushita* or a weighing of the evidence. (Petition i, Question 2; 16-26). The court of appeals naturally referred to *Matsushita* as a recent opinion of this court

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[3] Petitioners' suggestion (Petition 7-9) that Judges Posner and Easterbrook join in their criticism of the decision below is spurious. Judge Posner's decision in *Morrison* v. *Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986), affirmed a grant of summary judgment. Judge Easterbrook picks no quarrel with the grant of summary judgment in proper cases, but states the undisputed point that evidence is not to be weighed in ruling on such motions; he also suggests that Rule 43(e) hearings on summary judgment motions should be "rare," not that they are improper (Petition 8-9). Neither Judge Posner nor Judge Easterbrook commented on this case.

on summary judgment, but its decision of this case did not rest solely on *Matsushita* or any other single precedent (*see* A8-9). The court of appeals' review of the evidence to determine whether a triable issue of fact existed was just that, a review not a "weighing," and its comments about the "implausibility" of petitioners' claim (*see* A14-15) were premised on basic and undisputed facts, not a "body of evidence" or a context "created" or "constructed" by the court as petitioners would have it (Petition at 19-25). Likewise, the court's discussion of petitioners' allegedly countervailing "evidence" (A16-19) shows that "evidence" to be wholly lacking in probative value—a showing petitioners do not attack.

3. The court of appeals did not even pose, much less adopt, the proposition that petitioners were required "to establish that respondent's violation was the exclusive cause of petitioners' injury" (Petition i, Question 3; 26-29). The court's reference to the success of integral flash cameras (A15) was a reference to an undisputed market fact, one among many that underscored the absurdity of petitioners' claim. As the court also noted, but the Petition (page 28) ignores, the "lead line" Interphoto had lost was not an Argus 110 camera with or without flipflash, but the Yashica 35 millimeter camera (A15-17), and any other business Interphoto may have lost in 1975 went to competitors who were themselves without a 110 flipflash camera (*see* A18; S1637-38). These were but a few of the many considerations why, given petitioners' inability to support their claim with facts, summary judgment was required.

B. This case was a contrived abuse of the judicial process from its inception. The district court's opinion alludes in brief to petitioners' dishonest and vexatious conduct (A71), and this conduct was further discussed in limited supplemental findings which noted that petitioners' officers

had contradicted themselves under oath when it served petitioners' varying litigation purposes, that their deposition transcripts were altered prior to signature to conform to petitioners' positions, that petitioners' chairman and chief executive officer had falsely testified in open court that Interphoto had ordered $2.5 million of 110 cameras to serve as its 1975 "lead line" (this being the keystone of petitioners' whole case) and then had recanted this fictional testimony when petitioners' own belatedly produced business records showed it to be untrue in its entirety (S1648-50). Dismissal of such a case is proper under any reading of Rule 56, and would be justified absent any rule providing for summary judgment as an exercise of the courts' inherent power to control the invocation of their own process and to prevent the abuse thereof. There is no right, constitutional or otherwise, to trial of fabricated cases.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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